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Supreme Court of the United States

OCTOBER TERM, 1970

No. 77

UNITED STATES OF AMERICA,

Appellant,

—v.—

THOMAS WILLIAM WELLER,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEE

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In the

Supreme Court of the United States

October Term, 1970

No. 77

United States of America,

Appellant,

—v.—

Thomas William Weller,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEE

Jurisdiction

In appellee's view exclusive jurisdiction is conferred on this Court by the Criminal Appeals Act, 18 U.S.C. §3731, and particularly the motion in bar and statutory construction provisions of such Act. See Point I, *infra,* for a full discussion of the jurisdictional questions.

Constitutional Provisions, Statutes and Regulations Involved

This case involves the due process clause of the Fifth Amendment and the assistance of counsel clause of the Sixth Amendment to the United States Constitution.

Pertinent provisions of the Criminal Appeals Act (18 U.S.C. §3731) and §10(b) of the Military Selective Service Act of 1967 (50 U.S.C. App. §460(b)) are reprinted in Appendix A of appellant's brief, pp. 55-57. The relevant provisions of §6(j) of the Selective Service Act of 1948 (former 50 U.S.C. App. §456(j)), 65 Stat. 83, are set forth in Appendix A of this brief, *infra,* pp. 101-102.

Several Selective Service regulations are likewise involved, some of which (32 C.F.R. §§1604.41, 1604.71, 1624.1 and 1624.2) are reprinted in Appendix A of appellant's brief, pp. 57-61. Additional Selective Service regulations which are involved in this case (32 C.F.R. §§1604.52, 1604.52a(a), 1604.54, 1604.55, 1604.57, 1604.58, 1621.15, 1622.1(c), and 1622.20(a)) are set forth in Appendix A of this brief, *infra,* pp. 102-106.

¶VI B 4 of the Department of Defense Directive 1300.6, also relevant, is also set forth in the Appendix, *infra,* p. 106.

Questions Presented

1. Whether this Court has exclusive jurisdiction over this direct appeal by the Government from the decision of the district court which granted a motion to dismiss an indictment for armed forces induction refusal on the grounds that the Selective Service regulation prohibiting counsel at local board personal appearances was not explicitly authorized by statute and is otherwise constitutionally invalid.

2. Whether the Selective Service regulation which prohibits the appearance of counsel for a registrant at a local board personal appearance is invalid because right

of counsel is a traditional procedural safeguard of which a registrant cannot be divested without explicit authorization by act of Congress.

3. Whether the Selective Service regulation which prohibits the appearance of counsel at a local board personal appearance is in violation of a registrant's constitutional right to due process under the Fifth Amendment and to the effective assistance of counsel under the Sixth Amendment.

Statement of the Case

Appellee concurs with so much of the statement of the case as appears in the brief for the United States (pp. 3-5) as recites the chronology of developments. Pursuant to Rule 40(3) of the Rules of this Court, appellee deems it necessary to set forth the following additional statement to correct inaccuracies or omissions appearing in the Government's statement:

1) The initial request by appellee and his counsel (A. 12)* that appellee's counsel be present at the personal appearance hearing was expressly for the purpose, as stated by counsel, "to advise him with respect to his rights." A later communication by appellee's counsel to the chairman of the local board made it clear that:

> "I propose to be present to advise my client as to his rights, and to aid him in any way I could with his presentation of his case to your board. This function is quite distinct from that of *representation* which is all that the cited regulation bars" (A. 18).

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* "A" refers to the Appendix in this Court.

The same letter from appellee's counsel stated as another reason for allowing counsel to be present the fact that under the recently terminated Department of Justice hearing procedures for conscientious objector applicants, counsel was allowed to be present.

> "The appearance before the local board is now the one and only time wherein a registrant may have any kind of hearing, present his case in person, present testimony on his own behalf, and meet his accusers in the sense that he may determine the reasons for prior denial of his claim" (A. 19).

Moreover, appellee's counsel's letter noted that recent decisions of this Court had upheld the right to counsel "where the proceeding involved a matter of the liberty and substantial personal rights of the individual" (A. 19). Finally, appellee's counsel's letter requested, in view of the substantially changed circumstances, "whether the Selective Service System has made a determination of the validity of the prior requirement with regard to exclusion of counsel" (A. 19).

The board chairman responded to this letter and discussed in detail other aspects of the personal appearance, but made no response or comment whatsoever to the request for counsel (A. 21-22).

A subsequent communication from appellee's counsel enclosed a copy of appellee's summary of his personal appearance hearing, expressly disclaimed any waiver of the prior request for counsel, and made the following comment:

> "There is a great and probably growing gap between the generations in our Nation. Communication across this line is difficult under the best of circumstances. Young people do not use the same words and language, or, when they do they may mean quite different things. In a period when they feel an increased alienation from the formal institutions of our society, to ask them to communicate their deep and heartfelt beliefs through cold, formal, letters, is unrealistic" (A. 23-24).

The only response from the board (A. 28) was a letter to appellee, a copy of which was sent to appellee's counsel, advising that the board had decided not to reopen appellee's classification. Subsequent letters by appellee (A. 30) and his counsel (A. 29-30) noted express and specific objection to the board's denial of counsel.

2. There are sharp disparities between the board's 'record' of what transpired at appellee's personal appearance (A. 16-17) and the summary prepared by appellee (A. 24-27). According to the appellee's version, considerably more ensued at the personal appearance than that revealed by the board's version. To cite one specific instance: if the appellee is correct in his statement that the chairman or a member of the board advised him that "it was not their function to judge such legal questions" as "whether they thought that certain sorts of religious beliefs and background were necessary . . ." (A. 24), then the board clearly acted erroneously and failed to exercise its mandated duty to hear and determine all questions concerning classifications. See Point III, Section 1, *infra*.

3. These proceedings occurred in November of 1967. At such time, *United States* v. *Seeger*, 380 U.S. 163 (1965) had

been decided which gave a broader definition to religious training and belief than that which had previously prevailed. The record does not contain any statement of reasons for the board's action (A. 17, A. 28), and it is not at all clear that the board followed the proper standards. Appellee did not have counsel present to assist him in the presentation of his claim and to insist in the application of the proper legal principles.

4. The district court ruled that a local board personal appearance "is a critical stage of an administrative process at which substantial rights are adjudicated" (A. 32), and that the holding by this Court in *Greene* v. *McElroy,* 360 U.S. 474 (1959), requires explicit congressional authorization before any fundamental procedural safeguard may be denied in such an administrative adjudicatory proceeding. *Ibid.* The court carefully reviewed the statute and, finding no such explicit authorization, ruled that the regulation which prohibits counsel at a local board personal appearance (32 C.F.R. §1624.1(b)) is invalid (A. 33). Following *Greene* v. *McElroy, supra,* the court held that any argument of "acquiescence or implied ratification" by congressional inaction was insufficient (A. 33-34). The court below carefully distinguished other decisions holding that there was no constitutional right to counsel under the due process clause for a number of reasons, including that none of these prior decisions had ruled on the question of explicit authorization.

The district court also held, tracing recent decisions of this Court and other courts in other types of administrative adjudications involving personal and property rights, that there was a constitutional right under the due process

clause to counsel at such adjudications. The Government's suggestion (brief, p. 5) that the district court "was careful to circumvent" deciding the constitutional question, is not borne out by a reading of the district court's opinion. However, the district court did refrain from deciding whether there is a right of counsel under the Sixth Amendment.

The opinion of the district court also discussed the useful function which could be played by counsel at a local board personal appearance (A. 39-40), discounted any argument that counsel's presence would cause "litigious interruption" (A. 34-35, A. 39), and noted the inadequacy of the regulations dealing with optional advisors to registrants and government appeal agents (A. 40-41).

Summary of Argument

I.

After its appeal was filed in this Court pursuant to the provisions of the Criminal Appeals Act (18 U.S.C. §3731), the Government changed its position and moved to remand this case to the Court of Appeals for the Ninth Circuit, The Government's motion to remand was denied and further consideration of the jurisdictional question was postponed to the hearing of the case on the merits.

The decision of the district court brings this appeal directly within the motion in bar and statutory construction provisions of the Criminal Appeals Act, thereby conferring exclusive jurisdiction on this Court.

Contrary to the claims of the Government, this Court has never held that the motion in bar provision is constricted

to the common law definition of the term "plea in bar." Rather, this Court has held on many occasions that where an indictment is dismissed prior to trial terminating the cause and exculpating the defendant on the basis of questions of law outside of the general issues to be tried, all of the requisites of a motion in bar have been met. Moreover, where, as here, the defendant "confesses" to the acts charged in the indictment (refusal to report for induction) but "avoids" the consequences of those acts by relying on extraneous matter (refusal to permit counsel at a personal appearance before the local board), the jurisdiction of this Court is clear even under the most restrictive reading of the motion in bar provision. See *United States* v. *Mersky*, 361 U.S. 431, 457 (1960) (dissenting opinion of Mr. Justice Stewart).

Furthermore, the jurisdiction of this Court is mandated also by that provision of the Criminal Appeals Act granting direct appeal where the decision of the district court is based upon the construction of the statute upon which the indictment is founded. As in *United States* v. *Mersky*, *supra*, there is an intimate nexus between the statute and the regulations declared invalid. The district court's determination that the regulation was unauthorized by the Act necessarily involved a direct construction of the Act. Finally, the underlying Congressional purpose of requiring an exclusive appeal to this Court where a district judge dismisses an indictment because of major constitutional questions in the construction or validity of an Act of Congress, is properly served by this Court's retaining jurisdiction, and not acceding to the Government's contention that the case should be remanded to the Court of Appeals for the Ninth Circuit.

Thus direct appeal to this Court is mandated by the Criminal Appeals Act under both the motion in bar provision and the statutory construction provision.

II.

Only Congress has the power, under Article I, §8, of the Constitution, to raise armies, and thus only Congress has the power to establish the procedures by which men are to be conscripted. Without congressional authorization, the President may not establish such procedures at all; and without the most clearly explicit authorization, he may not attempt to establish procedures which deny to registrants traditional procedural safeguards.

The strong statement of this principle enunciated by this Court in *Greene* v. *McElroy,* 360 U.S. 474 (1959), has in no way been weakened by *Hannah* v. *Larche,* 363 U.S. 420 (1960), or any other subsequent case. In the light of *Greene's* clear statement that such explicit authorization is not to be found in mere "acquiescence or non-action," 360 U.S. at 507, the Government is clearly in error in resorting to such an argument.

Moreover, as to the legislative history which is so extensively cited by the Government at pp. 25-31 of its brief, the most that can be said for it is that it is exceedingly ambiguous. The views of General Hershey, as expressed in the Hearings of the House Armed Services Committee, were later expressly rejected by that Committee; Representative Kastenmeier's remarks on the floor of the House clearly were addressed only to the procedures followed at the appeal boards, and had nothing to do with the right to counsel at personal appearances before local boards; and finally, the debate on Senator Morse's amendment to

the 1967 Act was patently so confused and so misleading as to render any "interpretation" based upon it utterly without persuasive value.

III.

The principal constitutional question in this case is whether a selective service registrant has a constitutional right to the advice and assistance of retained counsel at a personal appearance before his local board.

When a registrant exercises his guaranteed right to a personal appearance, it is for the express purpose of contesting a classification which the board has previously given him. The board's function, in line with statute and regulations, is to "hear and determine" all questions or claims with respect to classifications, exemptions and deferments. The broad array of possible classifications, conscientious objector and otherwise, which a local board must consider and determine, perforce requires it to engage in a series of fact-findings, determinations of legal questions, and exercises of discretion.

In performing these functions the local board adjudicates questions involving personal and property rights, much as any other administrative agency performing an adjudicatory function. Furthermore, the regulations governing local board personal appearances, such as swearing of witnesses, subpoena power and burden of proof, bespeak its adversary character.

A number of court decisions have expressly recognized the adjudicative character of local board classification actions, in accord with a host of decisions from other areas of administrative law which have found that the essence of an adjudicatory hearing is the process of hearing and deter-

mining factual and legal questions. The quaint image of local boards as non-adversary "little groups of neighbors" is revealed as a fiction upon analysis of the board's processes and functioning. This analysis is buttressed by various studies which have been made and a number of decisions which have sought to enforce the oft-violated regulation requiring local board members "if at all practicable" to be residents of the board's jurisdictional area.

A review of the history of selective service law decisions by this court from 1946 to 1970 reflects an increasing recognition of the essential adversary and adjudicative character of local board classification action. Moreover, a number of decisions of lower federal courts have specifically commented on the unfairness of subjecting registrants without counsel to this adjudicative process.

It is an axiom of administrative law that certain minimum standards of due process must be met where an agency adjudicates personal and property rights. It is no less axiomatic that one of the most fundamental of these procedural due process safeguards is the right to be heard, in person, and to present evidence, and that such right is meaningless without the accompanying right to the presence, assistance and advice of counsel. This right has been recognized with respect to welfare termination hearings, non-criminal juvenile proceedings, deportation proceedings, parole revocation proceedings, license application and revocation proceedings, and a variety of other proceedings. It was specifically recognized for twenty years in many thousands of conscientious objector hearings before Department of Justice hearing officers.

Many federal agencies expressly recognize right of counsel by statute and/or regulation; a number do not appear to have any right to counsel regulations; but there is no

other agency with an express prohibition analogous to that of selective service.

There is no rational basis for justifying unique treatment for selective service personal appearances. The special treatment mythology which the agency has itself developed and fostered over the years should be recognized and ended.

Various decisions cited by the Government as supporting the denial of counsel are all distinguishable, many on the most obvious grounds, and none of them show any careful review of the constitutional question involved. This Court's decisions in *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), and *In re Gault,* 387 U.S. 1 (1966), which hold that there is a constitutional right to counsel under the due process clause in welfare and juvenile proceedings, are plainly and persuasively in point. On the other hand, *United States* v. *Nugent,* 346 U.S. 1 (1953), cited by the Government, is plainly not in point for a number of reasons, including principally the fact that it was not a right of counsel case since the registrant had counsel in the very proceeding involved in that case. Other cases cited by the Government are also inapplicable because they involved non-final, non-adversary, non-adjudicatory proceedings which this Court has always held do not require the same due process rights as adversary proceedings which adjudicate personal and property rights. See *Hannah* v. *Larche,* 363 U.S. 420 (1960).

In addition to the argument based on Fifth Amendment due process, appellee contends that there is a right to counsel under this Court's interpretation of the Sixth Amendment's right to counsel at every critical stage of the pretrial events. It is virtually inevitable that a conscientious objector applicant whose claim has been denied will refuse induction and be required to seek judicial review by means

of defense to a prosecution for induction refusal. This, combined with the exceedingly narrow scope of judicial review, makes the local board personal appearance a critical stage of the proceedings. Unless the right to counsel is afforded at this critical stage it may well be useless at the trial.

Many of the catalogued abuses of registrants' rights which have occurred, either innocently or non-innocently, might well have been prevented if registrants were permitted to be accompanied by counsel. Counsel's role of delineating the issues, assisting in fact presentation, and safeguarding the registrant's interest would be essentially the same as that contemplated by this Court for counsel for welfare recipients in *Goldberg* v. *Kelly, supra.* There is no reason to fear litigious interruption or delay and, in any event, the size of the local boards can be increased to cope with any increase in activity. Moreover, it can be expected that counsel's presence will be useful to the agency as well as to the registrant. Government Appeal Agents, subject to serious conflict of interest, and optional advisors to registrants have demonstrably not satisfied the registrants' needs or their constitutional rights for a number of reasons, of which the principal one is their unavailability. Private counsel, experienced in selective service law, are available. Free legal services are available for indigent registrants both from publicly-funded legal service offices and from privately organized panels.

POINT I

The exclusive jurisdiction of this Court to hear this direct appeal is explicitly mandated by both the motion in bar and statutory construction provisions of 18 U.S.C. §3731, the Criminal Appeals Act.

The Appellee, defendant below, moved in the district court to dismiss the indictment prior to trial on several grounds. It was contended by the defendant that the Selective Service regulation barring attorneys at personal appearances before a local board [32 C.F.R. 1624.1(b)] was either a denial of his constitutional rights or was unauthorized by the provisions of the Military Selective Service Act of 1967 (A. 3-4). After hearing the arguments of counsel, considering legal memoranda, and reading defendant's entire Selective Service file, the district court dismissed the indictment, holding as follows:

> "Accordingly this court is loath to hold that the administrative denial of such a right is either authorized by Congress or is constitutional" (A. 42).

Following the order of the district court, the Government filed its notice of appeal to this Court pursuant to the Criminal Appeals Act, 18 U.S.C. §3731, on the grounds that authority for direct appeal attached thereunder (A. 43). The Government then changed its mind with respect to the basis of the jurisdiction of this Court and on January 16, 1970 moved to remand the case to the Court of Appeals for the Ninth Circuit. On March 23, 1970 this Court denied the Government's motion to remand and further consideration of the jurisdictional question was postponed to the hearing of the case on the merits. —— U.S. —— (A. 44).

1. ***The Ruling of the Court Below Which Dismissed the Indictment Prior to Trial, Ending the Cause and Exculpating the Defendant on the Basis of Questions of Law Outside of the General Issue to Be Tried, Is a Motion in Bar for the Purposes of the Criminal Appeals Act.***

In claiming that the Criminal Appeals Act does not confer direct jurisdiction upon this Court, the United States is asking the Supreme Court to adopt the proposition that the motion in bar provision is limited to its common law scope (Government's Brief, pp. 6, 14). This Court has never accepted that approach. See *United States* v. *Sisson*, —— U.S. ——, 38 U.S.L.W. 4616, dissenting opinion of Mr. Justice White, at 4635. Contrary to the Government's contention, this Court on several occasions has held that where the dismissal of an indictment by its own force would end the cause and exculpate the defendant without subjecting him to double jeopardy, the requisites of a motion in bar for purposes of the Criminal Appeals Act have been met. In other words, it is the effect of the ruling below—and not of how the pleading is styled—that is of consequence. So long as the ruling below has the effect of an absolute bar to further prosecution without subjecting the defendant to double jeopardy, that ruling constitutes a motion in bar and is directly reviewable in the Supreme Court. See *United States* v. *Hark*, 320 U.S. 531, 535-36 (1944); *United States* v. *Murdock*, 284 U.S. 141 (1931); *United States* v. *Oppenheimer*, 242 U.S. 85 (1916); *United States* v. *Celestine*, 215 U.S. 278 (1909); *United States* v. *Goldman*, 277 U.S. 229, 236-37 (1928); *United States* v. *Rabinowich*, 238 U.S. 78 (1915); *United States* v. *Blue*, 384 U.S. 251 (1966); *United States* v. *Covington*, 395 U.S. 57 (1969). See also *United States* v. *Fix*, —— F.2d ——, No. 25216 (U.S. Court of Appeals, 9th Circuit, July 1,

1970); Friedenthal, Government Appeals in Federal Criminal Cases, 12 Stan. L. Rev. 71, 77-78 (1959).

Since the appellee had not yet been brought to trial when dismissal occurred, there can be no question of double jeopardy. See *United States* v. *Celestine, supra.* Undoubtedly, the effect of the district court's ruling was to end the cause permanently and exculpate the defendant. Thus, pursuant to the above cited decisions of this Court, jurisdiction under the Criminal Appeals Act is secure.

Contrary to the contentions of the United States, the legislative history of the Criminal Appeals Act supports this interpretation rather than that proposed by the Government of limiting the motion in bar provisions to its common law ambit. For example, Senator Knox, a former Attorney General, stated as follows:

> "The Government takes the risks of all the mistakes of its prosecuting officers and of the trial judge in the trial, and it is only proposed to give it an appeal upon questions of law raised by the defendant to defeat the trial and if it defeats the trial."

41 Cong. Rec. 2752 (1907).

Furthermore, Senator Patterson, one of the sponsors of the Act, defined a special plea in bar as follows:

> "A special plea in bar . . . is a plea that does not relate to the guilt or innocence of the defendant in the sense as to whether he did or not commit the act for which he was indicted. A special plea in bar is that which is set up as a special defense notwithstanding the defendant may be guilty of the offenses with which he is charged; it is for some outside matter; yet it may have been connected with the case."

41 Cong. Rec. 2753 (1907).

It is obvious from these remarks that the framers of the Criminal Appeals Act intended a case such as this one to be included within the motion in bar provisions. The questions of law raised by appellee prior to the trial defeated the trial and were based upon matters unrelated to his refusal to report for induction, the offense for which he was indicted.

Moreover, jurisdiction in this case obtains under the motion in bar provision even under its most restrictive reading. This interpretation was set forth by the dissenters in *United States* v. *Mersky*, 361 U.S. 431, 457 (1960). Mr. Justice Stewart, joined by Mr. Justice Frankfurter and Mr. Justice Harlan,[1] stated that a motion in bar was identical to the common law plea in confession and avoidance:

> "The plea in confession and avoidance did not contest the facts alleged in the declaration, but relied on new matter which would deprive those facts of their ordinary legal effect. • • • It set up affirmative defenses which would bar the prosecution."

361 U.S. at 457.

It is only by strained and convoluted argument that the Government contends that the motion and ruling below fails to fall within this definition. It is clear that the question of law raised by the motion and by the ruling of the district court did not appear on the face of the indict-

[1] Mr. Justice Harlan delivered the opinions of the court in *United States* v. *Blue*, *supra*, and *United States* v. *Covington*, *supra*, both post-*Mersky* decisions, which upheld direct appellate jurisdiction.

ment and that "new matter" was relied upon, *United States* v. *Blue, supra,* at 254, which insulated the appellee's refusal to report for induction from its ordinary legal effect. The position taken by the appellee was that he "confessed," that he did not submit to induction, but that he sought to "avoid" that as an act for which he could be prosecuted by "relying on new matter which would deprive these facts of their ordinary legal effect." *Mersky, supra,* at 457.

Unlike the defendant in *Sisson, supra,* however, the "new matter" relied on by the appellee in this case, and raised by his motion, did not consist of facts which would necessarily be tried with the general issue in this case. The primary elements of the offense of a refusal to submit to induction are refusing to step forward when one's name is called the third time and having the required criminal intent. See *Chernekoff* v. *United States,* 219 F.2d 721 (9th Cir. 1955); *United States* v. *Rabb,* 394 F.2d 230 (3d Cir. 1968). The crux of the prosecution's case when the crime alleged is induction refusal is simply whether or not the defendant has wilfully refused to submit to induction. The courts have consistently held that a presumption of regularity attaches to the official acts of local boards, which, standing alone, is sufficient to uphold a conviction for induction refusal. See *Yates* v. *United States,* 404 F.2d 462 (1st Cir. 1968), *cert. denied* 395 U.S. 925 (1969); *United States* v. *Weersing,* 415 F.2d 130 (9th Cir. 1969), *cert. denied* 396 U.S. 987 (1970); *United States* v. *Norman,* 413 F.2d 789 (6th Cir. 1969), *cert. denied* 396 U.S. 1018 (1970); *Little* v. *United States,* 409 F.2d 1343 (10th Cir. 1969); *United States* v. *Sandbank,* 403 F.2d 38 (2d Cir. 1968), *cert. denied* 394 U.S. 961 (1969); *Lowe* v. *United States,* 389 F.2d 51 (5th Cir. 1968).

It is completely incongruous for the United States, in the light of all these holdings and of the consistent posture which it takes in the prosecution of Selective Service cases,[2] to now argue that the propriety of a Selective Service regulation barring counsel is a "fact" which would be presented to the jury in trying the general issue. Thus, the motion below and the ruling of the district court qualify as a motion in bar for the purposes of the Criminal Appeals Act, no matter which interpretation is given to that provision.

The Government's arguments in this case seeking to take this ruling out of the jurisdiction of this Court make the comments of Mr. Justice Brennan, concurring in *United States* v. *Mersky, supra,* appropriate here. To adhere to the contentions put forward by the Government would "unsettle what has been settled by [the Supreme Court's] precedents and re-introduce[s] archaisms into federal criminal procedure . . ." *United States* v. *Mersky, supra,* at 441.

2. *The Decision of the District Court Dismissing the Indictment Is Based Upon the Construction of the Statute Upon Which the Indictment Is Founded and Also Confers Jurisdiction in This Court Upon Direct Appeal.*

In addition to the clear jurisdiction of the Court under the motion in bar section of the Criminal Appeals Act, it is also plain that the decision below is based upon the construction of the statute upon which the indictment is founded, and for that reason as well the Supreme Court has jurisdiction on direct appeal.

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[2] The guidebook published by the Selective Service System to aid prosecutors states that the Government's case "is satisfied by proof that an order to report for induction was issued and the registrant failed to comply." L. HERSHEY, LEGAL ASPECTS OF SELECTIVE SERVICE, 54-55 (Rev'd ed. 1969).

In *United States* v. *Mersky, supra,* this Court held that the construction of a regulation promulgated under a statute is a construction of the statute for the purposes of the Criminal Appeals Act. In so holding, the Court said:

> "Here the statute is not complete by itself, since it merely declares the range of its operation and leaves to its progeny the means to be utilized in the effectuation of its command. • • • The result is that neither the statute nor the regulations are complete without the other, and only together do they have any force. In effect, therefore, the construction of one necessarily involves the construction of the other." 361 U.S. at 437-438.

The present case involves a very similar statutory scheme to that considered in *Mersky.* The following provisions of the Military Selective Service Act authorizing the President to promulgate rules and regulations under that Act illustrate the close nexus between the Act and the regulations promulgated thereunder:

> "The President is authorized, from time to time, whether or not a state of war exists, to select and induct into the Armed Forces of the United States for training and service in the manner provided in this title • • • such number of persons as may be required to provide and maintain the strength of the Armed Forces." 50 U.S.C. App. §454(a).

> "The selection of persons for training and service under section 4 • • • shall be made in an impartial manner, under such rules and regulations as the President may prescribe, • • •" 50 U.S.C. App. §455(a)(1).

"The President is authorized—

(1) to prescribe the necessary rules and regulations to carry out the provisions of this title." 50 U.S.C. App. §460(b)(1).

. . . .

(3) * * * Such local boards, or separate panels thereof each consisting of three or more members, shall, under rules and regulations prescribed by the President, have the power within the respective jurisdictions of such local boards to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title * * * of all individuals within the jurisdiction of such local boards." 50 U.S.C. App. §460(b)(3).

"Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *" 50 U.S.C. App. §462(a).

Indeed, the indictment charging the appellee with an offense charged him with a wilful and knowing violation of both the Act "and the . . . regulations . . . duly made pur-

suant thereto" (A. 2). Thus, there is no question but that here, as in *Mersky,* the statute is not complete in and of itself but authorizes and in fact requires the promulgation of regulations to fill out its scheme. "When the statute and regulations are so inextricably intertwined, the dismissal must be held to involve construction of the statute." *Mersky, supra,* at 438.[3]

The court below, in applying the authorization test of *Greene* v. *McElroy,* 360 U.S. 474 (1959), analyzed the statutory and regulatory scheme (A. 12). The court first read the Act to search for an express authorization for the denial of the right to counsel (A. 13-14). It then reads the Act to try to find any express delegation of the power to do so (A. 14). It found none in the Act. It then analyzed the Act for possible sources of implicit delegation of such authority. It examined Section 1(c) [50 U.S.C. App. 451(c)] and Section 10(b)(3) [50 U.S.C. App. 460(b)(3)], construed them, and found that they are clearly "not 'explicit action by the Nation's lawmakers' (in this case Congress) taking the constitutionally-suspect action of removing the right to be represented by counsel" (A. 23). To view this analysis of the court below as anything other than a construction of the statute is to twist language beyond reason.

It is obvious that where, as here, the issue before the court is whether a regulation is authorized by a statute, the judicial determination of that question involves a construction of the statute and authorizes direct appeal under the Criminal Appeals Act. See *United States* v. *Foster,* 233 U.S. 515, 523 (1914); Kurland, *The Mersky Case and*

[3] Notwithstanding its position that statute and regulation are not "inextricably intertwined" in this case, earlier in the Government's brief the combination of statute and regulation is without much ado characterized as "part of the Selective Service law," p. 5.

the Criminal Appeals Act: A Suggestion for Amendment to the Statute, 28 U. Chi. L. Rev. 419 (1961); Friedenthal, *supra.*

Obviously, the purposes of the Criminal Appeals Act are equally well served when a court declares a regulation invalid as unauthorized by a statute as when a court construes the statute directly. As this Court stated in *United States* v. *Mersky*:

> "It therefore appears abundantly clear that the remedial purpose of the Act was to avert 'the danger of frequent conflicts, real or apparent, in the decisions of the various district or circuit courts, and the unfortunate results thereof'; and to eliminate 'the impossibility of the government's obtaining final and uniform rulings by recourse to a higher court.' 20 Harv. L. Rev. 219. Moreover, the desirability of expedition in the determination of the validity of acts of Congress, which is pointed to as a desideratum for direct appeal, *applies equally to regulations.* In practical operation, correction of a regulation by agency revision invariably awaits judicial action." *Supra,* at 436 (emphasis added).

The Government's attempt to distinguish this case from *United States* v. *Eisdorfer,* No. 330, 1969 Term, appeal dismissed, 396 U.S. 1066 (1970), and from the positions taken therein both by the Government and by the Court, is unpersuasive. The Government concedes that to apply the *Eisdorfer* rationale here

> ". . . it is necessary to argue that the issue of the legality of appellee's classification, which goes to the validity of the order to report, is encompassed in the charge of disobedience to the order and that the regulation bearing upon the process by which the local board

determines the classification in turn conditions the validity of the classification." Brief, p. 19.

Further, it is conceded (p. 19) that the district court was justified in dismissing the indictment (once it found that the process leading to the order to report for induction was invalid). Yet the Government suggests that the dismissal was not based on a finding that the induction order was void. It seems to suggest that the decision of the court below should be read as holding that in some metaphysical sense the order to report for induction was valid, and that nevertheless the registrant could not be prosecuted for wilful disobedience of it. Even if this theory were conceptually valid, it is an analysis which would put the case squarely back in the "confession and avoidance" category as a motion in bar.

In conclusion, the exclusive jurisdiction of this Court upon direct appeal, pursuant to the Criminal Appeals Act, is clearly mandated in both the motion in bar provision and the statutory construction provision. This is evident not only from the foregoing analysis, but from a consideration of the broad statutory purpose of allowing a direct appeal to this Court from decisions of district courts which dismiss indictments because of major constitutional questions in the construction of the statute. See *United States* v. *Sisson, supra.* The purpose was to bring such decisions of national impact directly to this Court for review by the highest constitutional authority.[4] The decision below, holding that

[4] "Appeal was to be for the purpose of deciding 'constitutional questions', 'questions of law' which if the district judge's decisions were permitted to stand could lead to conflict and different treatment under the same criminal statutes in different parts of the country." *United States* v. *Sisson, supra,* 38 U.S.L.W. at 4631 (dissenting opinion of Mr. Chief Justice Burger).

a thirty-year old "part of the Selective Service law," Government's Brief, p. 5, whose continuation, we are urged, is necessary to avoid "constructive paralysis" (p. 46) of the system, was invalid on constitutional grounds, is plainly that kind of decision.

POINT II

The selective service regulation which prohibits the presence of counsel at a local board personal appearance is invalid because it is a denial of a traditional procedural safeguard which was not explicitly authorized by Congress.

1. *Only Congress Has the Power to Conscript Armies and to Limit the Procedural Rights of Selective Service Registrants.*

The essence of the decision of the court below is that:

> "... nowhere in the Act has Congress expressly denied the right to counsel or expressly delegated the power to do so to the President" (A. 33).

Following *Greene* v. *McElroy*, 360 U.S. 474 (1959), the district court held that the statutory provisions which authorize presidential regulation of local boards

> "... clearly are not 'explicit action by the Nation's lawmakers' (in this case, Congress) taking the constitutionally-suspect action of removing the right to be represented by counsel" (A. 33).

The premises underlying the court's holding are that only Congress can declare war, Constitution, Article I, §8; and only Congress can draft manpower. Consequently,

only Congress can declare that a selective service registrant shall be denied counsel. These self-evident constitutional axioms are, however, questioned by the Government (Brief, p. 22, n. 7). The incredible suggestion is made—without any citation of authority—that the President himself has power under Article II, §2, of the Constitution—even without congressional authorization—to deny traditional safeguards to selective service registrants.[5]

The Government superimposes upon this argument of limitless presidential power the contention that the exercise of such power is unreviewable, since it presents "nonjusticiable controversies of a political nature . . . ."[6]

With all due respect, the Solicitor General is wrong on both grounds. This Court has on many occasions reiterated that there are constitutional limits on the President's exercise of military powers, even in wartime. See *Youngstown Sheet and Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952);

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[5] The implication of the Government's argument in footnote 7 of its brief is that the President has power—without congressional authorization or sanction—to promulgate regulations which would provide for conscription of manpower without any personal appearances at all, and without any procedural safeguards whatsoever. It is not clear if the Government's argument runs so far as to claim exclusive presidential power—without congressional authorization—to draft manpower, or even to use his powers as commander-in-chief of the armed forces to raise an army whenever and however he deems it appropriate.

[6] The only authority cited for this dubious proposition is this Court's denial of certiorari in *Mora* v. *McNamara,* 389 U.S. 934 (1967). It is surprising to find the Solicitor General imputing substantive significance to a denial of certiorari in the light of the repeated admonitions by this Court that such a denial "imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States* v. *Carver,* 260 U.S. 482, 490 (1923). See *Maryland* v. *Baltimore Radio Show,* 338 U.S. 912, 917-920 (1950); Stern & Gressman, *Supreme Court Practice,* 213-218 (1969).

United States v. *Robel*, 389 U.S. 258, 263 (1967); *Galvan* v. *Press*, 347 U.S. 522, 530 (1954); *Ex parte Endo*, 323 U.S. 283 (1944). Moreover, the "political question" spectre has been decisively exorcised. See *Baker* v. *Carr*, 369 U.S. 186 (1962); *Powell* v. *McCormack*, 395 U.S. 486 (1969); compare *Berk* v. *Laird*, —— F.2d ——, 3 S.S.L.R. 3142 (2d Cir. 1970).

2. *The Court Below Correctly Applied the Requirement of Explicit Authorization.*

The court below correctly applied *Greene* v. *McElroy*, *supra*, to reach its decision that the regulation prohibiting counsel was never authorized by Act of Congress (A. 33-34). This Court held in *Greene* that the requirement of explicit congressional authorization before any denial of a procedural safeguard is constitutionally tolerable is necessary because:

> "Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." 360 U.S. at 507.[7]

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[7] It is, therefore, difficult to understand how the Government reads *Greene* v. *McElroy* as holding that a denial could be legitimatized "either by direct action or by careful and purposeful inaction" (p. 22). Nowhere does the phrase "careful and purposeful inaction" appear in the cited pages of *Greene* v. *McElroy*, 360 U.S. at 506-507. The phrase which this Court did use was "careful and purposeful consideration" as a concomitant of "explicit action." This court specifically held that "such decisions cannot be assumed by acquiescence or non-action." *Ibid.* It is a mystery, to say the least, how the authors of the Solicitor General's brief can so nimbly convert "inaction" into its opposite. That this Court meant what it said when it required "explicit action" is further demonstrated by the very sharp dissenting opinion of Mr. Justice Clark, 360 U.S. at 510-524. Pointing to the many instances of congressional consideration and review of the personnel security program in-

This Court's decision in *Greene* was not a biological sport, but merely a continuation of a well-established doctrine requiring express congressional approval as a precondition for denial of procedural rights. See *Panama Refining Company* v. *Ryan,* 293 U.S. 388, 418 (1935) (regulation invalid because "The Congress left the matter to the President without standard or rule, to be dealt with as he pleased."); *Ex parte Endo,* 323 U.S. 283, 300 (1944) ("We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the lawmakers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."); *Kent* v. *Dulles,* 357 U.S. 116, 129 (1958) ("We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of the citizen."); *Schneider* v. *Smith,* 390 U.S. 17 (1968); see also *Gonzalez* v. *Freeman,* 334 F.2d 570, 579 (D.C. Cir. 1964).[8]

The most recent application by this Court of the *Greene* doctrine occurred in *Gutknecht* v. *United States,* 396 U.S. 295 (1970), where a selective service regulation which denied procedural safeguards was held invalid because of the absence of explicit congressional authorization. In *Gutknecht,* however, the proponents of the Government's position could and did argue that there was some explicit congressional authorization evidenced by the use of the

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volved in the *Greene* case, and particularly the publication by Congress of all of the regulations in an official directory, Mr. Justice Clark wrote "In other cases we have held that the inaction of the Congress, in circumstances much less specific than here, was a clear ratification of a program as it was then being carried out by the Executive." *Id.* at 523.

[8] In *Gonzalez, supra,* then Circuit Judge Burger held that in the absence of specific legislative authority, a statute would not be read to authorize debarment of a Government contractor without regulations establishing safeguards and a basically fair procedure.

word "delinquent" in the statute. In this case, *a fortiori,* there is not a single word in the statute which suggests explicit authorization of the prohibition of counsel.

3. *Congressional Inaction Does Not Provide the Required Authorization.*

The Government next suggests (Brief, p. 23) that this Court modified the *Greene* v. *McElroy* rule of explicit authorization by its decision one year later in *Hannah* v. *Larche,* 363 U.S. 420 (1960). But a reading of *Hannah* gives no support to the Government's desire that "purposeful inaction" be deemed synonymous with "explicit authorization". This Court in *Hannah* was not faced with the problem of finding explicit authorization for a regulation restricting traditional safeguards at adjudicatory proceedings. First, as the Court determined, the proceedings of the Civil Rights Commission in *Hannah* did not involve the adjudication of personal and property rights. 363 U.S. at 441. See discussion in Point III *infra,* pp. 37-45. Second, in *Hannah* it was abundantly evident that there were two discrete and contradictory legislative proposals before Congress, each of which explicitly dealt with the procedures to be followed by the Civil Rights Commission. Although both proposals allowed right of counsel and certain other fundamental procedural rights, that which was rejected by Congress allowed greater scope to the right of counsel and broader procedural rights to witnesses called before the Commission. This Court found that Congress explicitly rejected the broader proposal and explicitly accepted the narrower proposal. *Hannah* v. *Larche,* 363 U.S. at 431-437.

The situation in this case is vastly different. There is no mention in the statute of a limited right of counsel as

was the case in *Hannah*. There is not even the tangential use of the word "counsel" in any context relating to a personal appearance. Compare *Gutknecht* v. *United States, supra*. Much less is there here any express authorization to the President to promulgate a regulation denying counsel, or limiting the right of counsel, or authorizing the President to grant or deny counsel in his discretion. As we set forth below, the legislative history evinces considerable confusion with regard to the role of the government appeal agent and the advisor to registrants, and to related selective service procedures. On the other hand, in the adoption of this very same statute, the Military Selective Service Act of 1967, Congress knew how to legislate an express prohibition of that which it feared might cause "litigious interruption," and indeed did so in the amendment of Section 10(b)(3) of the Act, 50 U.S.C. App. §460(b)(3), so as to limit judicial review of local board classifications and processing.[9]

4. *The Argument of Congressional Acquiescence Is Not Persuasive.*

Finally, the Government argues that the regulation should be held valid, even if not explicitly authorized, because of what it regards as long congressional acquiescence. Brief, pp. 23-25. A number of cases are cited os-

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[9] "Expressio unius est exclusio alterius." See *Hunt Foods and Industries, Inc.* v. *F.T.C.*, 286 F.2d 803, 807 (9th Cir. 1961), *cert. denied* 365 U.S. 877 (1961). In totally ignoring the obvious implications to be drawn from the very words of the statute, the Government has failed to take account even of the language of Mr. Justice Reed, in *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 542 (1940): "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes."

tensibly in support of this proposition.[10] To begin with, this Court specifically refused to follow the argument of acquiescence in *Greene* v. *McElroy*, 360 U.S. at 506-507. See also *Ex parte Endo, supra; Kent* v. *Dulles, supra.* Just this past term, in *Toussie* v. *United States*, 396 U.S. 875, 25 L. Ed.2d 156 (1970), this Court was urged to find that failure to register was a continuing offense because Congress had repeatedly re-enacted selective service acts, often with substantive changes, but had taken no action to repudiate the long-standing administrative and judicial construction. The Court nevertheless refused to find requisite congressional approval, since this could be found only in "explicit language of the substantive criminal statute." 25 L. Ed.2d at 161.

The teaching of *Girouard* v. *United States*, 328 U.S. 61, 69-70 (1946) is most applicable.

> "It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law .... The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence ...."

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[10] All of the cases cited by the Government (p. 25) are subject to the analysis in 2 Sutherland, *Statutes and Statutory Construction*, §5107 (3rd ed. 1943), likewise cited by the Government, that the theory of "long-standing interpretation" will be followed where "... reliance has been placed thereon by the public and those having an interest in the interpretation of the laws." *Ibid.* It is thus significant that most of the cases cited by the Government, and most other cases which have applied this theory, have dealt with tax or other fiscal regulations where private individuals are most likely to have made decisions of great importance in reliance on a continuing interpretation of a governmental regulation. In the lone selective service case cited, *Billings* v. *Truesdell*, 321 U.S. 542 (1944), the theory of long-standing interpretation was invoked in favor of a private individual and against the Government.

5. *The Legislative History of the 1967 Act Is at Best Ambiguous.*

The legislative history of the 1967 Act, cited extensively by the Government at pp. 25-31 of its brief, is not nearly so persuasive as the Government would have one believe. Much is made (pp. 25-29) of the testimony of General Hershey before the House Armed Services Committee, in response to various criticisms of selective service procedures, including the denial of the right to counsel. (*Review of the Administration and Operation of the Selective Service System,* Hearings before the Committee on Armed Services of the House of Representatives, 89th Cong., 2d Sess., June 22, 23, 24, 28, 29, and 30, 1966 (Doc. No. 75), pp. 9984-9995.) The Government neglects to mention, however, that in its *subsequent* Interim Report (*Review of the Administration and Operation of the Selective Service System,* An Interim Report of the Committee on Armed Services of the House of Representatives, 89th Cong., 2d Sess., August 4, 1966 (Doc. No. 76), hereinafter "Interim Report"), after noting the objections which had been raised to existing administrative procedures, and General Hershey's replies to those objections[11] (Interim Report, pp. 10177-10189), the Committee most explicitly stated: "However, the analysis of General Hershey by no means necessarily reflects the views or conclusions of the Committee on Armed Services" (Interim Report, p. 10190). Such an explicit disclaimer of intent to adopt the views expressed by General Hershey on the question of selective service proce-

[11] At these same hearings, General Hershey explained his resistance to any change in the statute:

> "You can do almost anything under this law, which is more than you can say for a great many laws that are on the books." *Id.* at 9698.

dures, of course, very seriously weakens any presumption that the Committee's failure to introduce an amendment in favor of permitting counsel should be construed as a positive approval of the denial of counsel. Here, as in *Girouard, supra,* one might readily conclude that at most the desire of the Committee was to "leave the problem fluid." 328 U.S. at 70.

The Government also offers, in support of its interpretation of the legislative history of the statute, a substantial amount of material from the floor debates in both the House and the Senate. But there is little in it to support the Government's contention that it demonstrates an explicit congressional intent to permit denial of counsel. How the criticisms by Rep. Kastenmeier of the procedures before *appeal* boards (emphasis in Government's Brief at p. 28) can be deemed even to have informed the members of the House of the lack of counsel at *local* boards, let alone to have demonstrated House approval of the procedure, is not explained by the Government for there is no way it can be explained.[12]

The Government also places great reliance on the defeat of the amendment offered by Senator Morse, on the floor of the Senate, which would have permitted counsel to registrants in personal appearances. An examination of the debate which preceded the vote on this amendment, how-

[12] Rep. Kastenmeier's apparent effort was to open up appeal board proceedings to allow presence of registrant and counsel. Indeed, so far as appeal boards are concerned, the registrant has now, and had in 1967, the right to submit in writing any document which he desires to submit, including, if he wishes, memoranda or other writings by counsel. Government's Brief, p. 41, n. 28. Thus, since the registrant himself does not personally appear before the appeal board, but is limited to the submission of written materials, the registrant has the right to counsel to the full extent of his contact with the appeal board.

ever, provides a most illustrative example of the dangers of which Mr. Justice Jackson was speaking when he issued his *caveat* about floor debates in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 396 (1951) (concurring opinion), that they are "not always distinguished for candor or accuracy."[13] Thus, Senator Morse made the argument that counsel was required because " . . . [T]he appeals officer does not represent the registrant. He represents the board. As I stated in my main remarks, we cannot justify having a prosecutor serve also as an attorney for the defendant." 113 Cong. Rec. 12503. In reply, Senator Richard Russell, Chairman of the Senate Committee on Armed Services, stated:

> "I understood [Senator Morse] to say that it would be the same person in both cases. That is not so. The appeals agent does not represent both the board and the registrant in the same proceeding.
>
> "There is a counsel for the registrant, and the appeals board has an appeals agent in addition. They are not one and the same person." *Ibid.*

The statements of Senator Russell, quoted above, are in direct contradiction to the provisions of 32 CFR §1604.71 (d)(4) and (5), which require the appeals agent to render assistance to the local board and to be "equally diligent in protecting the interests of the Government and the rights of the registrant in all matters." Senator Russell was also obviously confused and in error in his perception of the availability of "a counsel for the registrant." See

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[13] Mr. Justice Jackson argued persuasively that "resort to legislative history is only justified where the face of the Act is inescapably ambiguous . . . . Moreover, it is only the words of the bill that have presidential approval, where that approval is given. It is not to be supposed that in signing a bill the President endorses the whole Congressional Record . . . ." 341 U.S. at 396.

discussion of *optional* advisors to registrant and of divided responsibility of appeal agents, *infra*, pp. 93-97.[14]

This is only one of several misstatements occurring in the debate on Senator Morse's proposed amendment.[15] The

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[14] Senator Russell's statement that "There is a counsel for the registrant" may suggest that the proper interpretation of the Senate's action is that suggested at 2 Sutherland, *Statutes and Statutory Construction*, §5015 (3d ed. 1943): ". . . [S]uch rejection may occur because the bill in substance already includes those provisions. Other interpretive aids may indicate that this is the case."

[15] (1) Senator Russell stated that the only question involved was whether a lawyer "should be permitted to go into the local selective service board when they are making their classifications." This is inaccurate, since appellee does not question the power of a local board to engage in its deliberations in executive session. The question of counsel involves presence with the registrant while the registrant's case is being presented to the board in an attempt to persuade the board to adjudicate in the registrant's favor. (2) Senator Holland, who actively participated in the debate, was under the mistaken impression that there is "always an appeal to the selective service head in the state." If the Senator was referring to the state appeal board, this is indeed true, provided that the registrant files a notice of appeal within thirty days of the prior classification action. 32 CFR §1626.2. But if the Senator was referring to an application for the discretionary exercise of power by the state director of selective service, this is clearly discretionary. 32 CFR §1626.1. (3) Senator Holland was, likewise, under the mistaken belief that allowing counsel would subject the board to lawyers' arguments "before there were decisions from the local boards . . . ." This betrays a fundamental misconception of the function of the personal appearance. A personal appearance does not occur, and cannot occur, until after the local board has already made its classification decision. See Point III, §1, *infra*. (4) Finally, Senator Ervin was under the mistaken impression that a lawyer's services were already available under existing law, with the sole exception that "they just don't let him make an oral argument." There was no recognition by Senator Ervin that a lawyer could not even be admitted for the limited purposes of rendering advice, which is allowed before the Civil Rights Commission, see *Hannah* v. *Larche*, *supra*, and no recognition that a lawyer's function at a personal appearance might be more than that of oral argument, but would include assistance in fact presentation and insistence on the regularity of procedures. See Point III, §4, *infra*.

cumulative effect of the confusion and misunderstanding casts the most serious doubt on any contention that the defeat of the amendment may be taken as demonstrating an informed intent in Congress to ratify the regulation's denial of counsel.

Finally, the Government seeks to show from the removal of the restrictions on Reserve personnel serving as Appeal Agents (Brief at pp. 31-32) that Congress sought to meet, "from within the Selective Service System itself, the recognized needs of registrants for legal advice and assistance . . . " But, in view of the serious confusion over the status and duties of the appeal agent introduced into the floor debate by the material quoted above, and the House Armed Services Committee's express rejection of the views of General Hershey on the necessity or advisability of permitting counsel (*Interim Report, supra*), it can hardly be said that an explicit position on the denial of counsel was here taken by Congress. Relying, as it does, on other aspects of the legislative history to lend support to the latter contention, it is clear that the Government's argument here is of the very weakest nature. "These slender threads of legislative comment simply cannot be woven into a conclusion of legislative sanction." *Dandridge* v. *Williams,* 397 U.S. 471 (1970) (dissenting opinion).

To conclude this point, the Government's argument in opposition to the eminently sound decision of the court below begins with a misreading of the explicit authorization requirement of *Greene* v. *McElroy;* proceeds to a misunderstanding of the holding of *Hannah* v. *Larche;* and overlooks the sharp limits which have been placed on the doctrine of legislative acquiescence. The Government's belabored argument of legislative history shows simply that

General Hershey had sharp views on the question, which were officially disclaimed by the House Committee; that the only debate in the House concerned appeal hearings; that the Senate debate over the Morse amendment was so thoroughly confused that it cannot fairly be said that any of the Senators accurately knew what existing regulations provided. This is obviously leagues away from the explicit authorization upon which this Court has insisted before tolerating the divesting of a fundamental right of constitutional dimension.

POINT III

A Selective Service registrant has a constitutional right to counsel at a local board personal appearance.

1. ***A Registrant's Personal Appearance at a Local Board Is an Adjudicative Hearing Affecting Substantial Rights.***

a. Nature of the Personal Appearance:

(1) A personal appearance in selective service law is a specific and discrete proceeding. It is a matter of right. Section 1624.1 of the selective service regulations, 32 C.F.R. §1624.1, grants to the registrant an unequivocal right to a personal appearance after classification action has been taken by the local board, so long as the registrant makes a written request for the personal appearance within thirty days of the notification to him by the board of the classification action. Thus, the structure of the personal appearance is such that it subsumes dissatisfaction with the classification action, and provides a formal method before the tribunal of first instance, the local board, to effect a change in the classification. Following the personal appearance, the local board is charged with the respon-

sibility of considering the evidence, documentary and otherwise, which the registrant presented to it and determining whether it should adhere to its prior classification decision or whether the registrant's contentions that the classification should be changed should prevail. 32 C.F.R. §1624.2.

(2) An analysis of the various types of classification decisions which local boards make demonstrates that insofar as concerns a dissatisfied selective service registrant, the local board determines questions of fact and law, and exercises discretion, with the same force and effect, and in much the same manner, as any other administrative agency performing an adjudicative function.[16] A review of the classifications provided by statute and regulation reveals an enormous array of findings of fact, conclusions of law, and exercises of discretion in which a local board must perforce engage to fulfill its statutory function "to hear and determine . . . all questions or claims with respect to inclusion . . . exemption or deferment. . . ." Military Selective Service Act of 1967 (hereinafter "Act"), §10(b)(3); 50 U.S.C. App. §460(b)(3).

(a) *Conscientious Objectors.* The board must determine if an applicant is a conscientious objector to participation in war in any form and thus entitled to I-O classification, 32 C.F.R. §1622.14, or if his conscientious objection is limited to combatant service and training and he is thus entitled to I-A-O classification, 32 C.F.R. §1622.11; Act §6(j), 50 U.S.C. App. §456(j). In making this determination, the local boards must properly apply the legal standards of religious training and belief as determined by decisions of this

[16] See discussion of distinction between agency performing rule making function and agency performing adjudicative function, *infra*, pp. 56-57.

Court. See, e.g., *Welsh* v. *United States,* 398 U.S. 333 (1970); *Seeger* v. *United States,* 380 U.S. 163 (1965); *Sicurella* v. *United States,* 348 U.S. 385 (1955). It must determine if the applicant is conscientiously opposed to participation in all wars or whether he is a "selective" conscientious objector. See *United States* v. *Sisson,* 297 F. Supp. 902 (D. Mass. 1969), *appeal dismissed for lack of jurisdiction,* 399 U.S. 267 (1970); *Gillette* v. *United States,* 420 F.2d 298 (2d Cir. 1970), *cert. granted,* —— U.S. —— (1970). It must determine, in many instances, if the application of a claimant for conscientious objector status makes out a *prima facie* case. *Mulloy* v. *United States,* 398 U.S. 410 (1970). In the case of an application presented after an induction order, special rules must be applied in terms of the time and manner of maturation of the registrant's views. See *Gearey* v. *United States,* 368 F.2d 144 (2d Cir. 1966), *cert. denied,* 389 U.S. 959 (1967); *Ehlert* v. *United States,* 422 F.2d 332 (9th Cir. 1970), *cert. granted,* —— U.S. —— (1970). In making these determinations, a large number of questions of fact must be evaluated, such as the weight to be given possible factual inconsistencies. See *Witmer* v. *United States,* 348 U.S. 375 (1955). This Court has reiterated on many occasions that the most significant factual determination is whether the applicant is sincere. *Witmer* v. *United States, supra; Welsh* v. *United States, supra.* Sincerity is a question of fact which must be determined in every case. *United States* v. *Seeger,* 380 U.S. at 185.

(b) *Occupational Deferment.* Although the regulations have changed from time to time over the years, the essential determinant in applications for occupational deferment in Class II-A was whether the employment is in the national health, safety and interest. 32 C.F.R.

§1622.22. The definition of deferable employment contained in Section 1622.23 of the regulations reveals a large number of factual and mixed legal/factual determinations which the board must make. Section 1622.20(b) enjoins the board that occupational deferments cannot be granted on a mass basis, but only "upon the basis of the status of such individual."

(c) *Student Deferments.* Determination of whether a student is entitled to I-S classification as a "student deferred by statute," pursuant to Section 1622.15, is obviously a legal question. See *Marsano* v. *Laird,* 412 F.2d 65 (2d Cir. 1969); compare *Rich* v. *Hershey,* 408 F.2d 944 (10th Cir. 1969). Whether a student is entitled to a II-S classification involves determination of such questions as whether he has "requested" the deferment, whether he is "satisfactorily pursuing a full-time course of instruction," whether the institution which he attends is a "college, university or similar institution of learning," definition of the "academic year" in terms of fixing the date of "the beginning of his course of study," and whether satisfactory progress is being made towards his degree. Section 1622.25.

(d) *Hardship Deferments.* In the case of a registrant who seeks a III-A classification, the board must decide the mixed legal/factual question of whether his induction would result in "extreme hardship;" the factual questions of whether the allegedly dependent person is "physically or mentally handicapped" and whether the registrant has "assumed in good faith" the support of such dependent person; and in many instances whether a person claimed to be a "child" meets the proper definition in the regulations. Section 1622.30. See *United States* v. *Burlich,* 257 F. Supp. 906 (S.D.N.Y. 1966).

(e) *Other Classifications.* Similar determinations of factual and legal questions must be made by the board to determine if a registrant is entitled to a veteran's classification under Class IV-A, 32 C.F.R. §1622.40(a)(1)-(9); or whether the registrant is entitled to such classification as a "sole surviving son." Section 1622.40(a)(10). See *McKart* v. *United States,* 395 U.S. 185 (1969). Questions of law are essentially involved in determining whether a registrant is a public officer deferred by law (e.g. "judge of a court of record") under Section 1622.41. The same is true when the board must determine if a registrant is entitled to a IV-C classification as being in one of those categories of aliens who are not obligated to perform military service under the law. Section 1622.42(a), (b), (c), (d). Whether a registrant is entitled to a IV-D classification as a "regular minister of religion," a "duly ordained minister of religion," or a student "preparing for the ministry" who meets certain other requirements involves many questions of law and fact. Section 1622.43. See *Dickinson* v. *United States,* 346 U.S. 389 (1953); *Cox* v. *United States,* 332 U.S. 442 (1947).

(3) All of these questions and many others must be decided by the local board whose statutory task is "to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusions for, or exemption or deferment from, training and service under this title, of all individuals within the jurisdiction of such local boards." Act, Section 10(b)(3); 50 U.S.C. App. §460(b)(3); 32 C.F.R. §1622.1(c); see §1622.20(a) ("On the local board is placed the responsibility, under applicable rules and regulations, of deciding which men should be deferred because of their civilian activities."). See Section 1624.2, paragraphs (b),

(d), and (e), each of which recognizes the hearing and determinative function of the local board.

This Court has explicitly recognized that the local board is an agency with "authority to hear and determine all questions of deferment or exemption." *Estep* v. *United States*, 327 U.S. 114, 120 (1946). It is argued *infra*, that where an administrative agency performs adjudicative functions with regard to personal or property rights, any hearing before it is an adversary proceeding. See *infra*, pp. 58-59. However, even on the most obvious level, determination that one registrant rather than another is to be unwillingly stripped of an occupational deferment clearly involves an adversary proceeding affecting his right to employment.[17] See *Truax* v. *Raich*, 239 U.S. 33 (1915); *Greene* v. *McElroy*, 360 U.S. 474 (1959). As Mr. Justice Brandeis pointed out in a case involving a determination as to which of two carriers would get a more favorable rate, "Every proceeding is adversary in substance if it may result in an order in favor of one carrier [registrant] as against another." *United States* v. *Abilene & So. Ry.*, 265 U.S. 274, 289 (1924).

b. Incidents of Personal Appearance.

The adjudicative and adversary character of a local board personal appearance is further demonstrated by the provision, in the selective service regulations, of a large number of features which customarily accompany adjudicative hearings before administrative agencies. The composition of the local board, 32 C.F.R. §1604.52; the circumstances under which a local board may be divided into

[17] It is the official position of the Selective Service System that "In determining deferment claims, its [the local board's] primary interest must be the national defense rather than the welfare or necessities of the registrant," L. HERSHEY, LEGAL ASPECTS OF SELECTIVE SERVICE 28 (Revised ed. 1969).

panels, §1604.52a; the jurisdiction of each local board, §1604.54; and the grounds of disqualification of local board members, §1604.55, are clearly delineated. Section 1604.57 mandates the administration of a specific oath to "every person testifying" before the local board. The oath refers specifically to the giving of "evidence" and designates the proceeding as a "hearing." The board is required to keep minutes, §1604.58. The board has subpoena power, §1621.15, under which it can require "any person" to appear before it, to produce papers and records, and to testify under oath, and compliance with the subpoena is enforceable in a United States court. See *Dickinson* v. *United States,* 346 U.S. at 396.[18] Section 1622.1(c) places the burden of proof upon the registrant: "Each registrant will be considered as available for military service until his eligibility for deferment or exemption from military service is clearly established to the satisfaction of the local board."

c. Adjudicative Character of Local Board Function.

It is thus apparent that the local board hears and determines, Act §10(b)(3), just like any other administrative agency performing adjudicative functions. See, e.g., *West Ohio Gas Co.* v. *Public Utilities Company of Ohio,* 294 U.S. 63, 70 (1935) ("suitable opportunity through evidence and argument" to challenge a rate); *Londoner* v. *City of Denver,* 210 U.S. 373, 386 (1908) (tax assessment requires full and fair opportunity to be heard on objections, including oral argument and proof); *Hornsby* v. *Allen,* 326 F.2d 605, 608 (5th Cir. 1964) ("licensing consists in the

[18] Perhaps an even more compelling demonstration of the recognized adversary nature of board proceedings is the provision in §1613.14 which requires a selective service registration official to contest, contradict and report in writing answers to questions believed to be incorrect or false.

determination of factual issues and the application of legal criteria to them"). "No matter how this language is examined, 'hear and determine' has ordinarily and usually implied but one thing, where no qualifying language is explicitly used, namely, an adjudicative, judicial-type, trial proceeding, whether in the courts or administrative agencies." Forkosch, *The Constitutionality of the Vietnam Venture and a Registrant's Right to Counsel Within the Selective Service System,* 22 So. Car. L. Rev. 287, 326-328 (1970).

That the local board's classification process is one of fact finding, evaluation, and determination "analogous to what occurs in a court trial or administrative quasi-judicial type hearing," Forkosch, *supra,* at page 332, is revealed in a number of cases. Thus, one Court of Appeals, in discussing a local board's function in evaluating the sincerity of a conscientious objector, speaks of "best evidence," and of "credibility and demeanor," and recognizes the board as "the fact finding agency." *United States* v. *Simmons,* 213 F.2d 901, 904 (7th Cir. 1954), *rev'd on other grounds,* 348 U.S. 397 (1955). Another Court of Appeals recognizes that "The board had the same right to evaluate the testimony of a witness before it as has a trial court." *Dickinson* v. *United States,* 203 F.2d 336, 345 (9th Cir.), *rev'd on other grounds,* 346 U.S. 389 (1953).

Several courts have explicitly recognized that "the function of the draft board is quasi-judicial." See *United States* v. *Bouziden,* 108 F. Supp. 395, 399 (W.D. Okla. 1952). The Eighth Circuit has held that draft board members are "quasi-judicial officers rather than in a purely ministerial or executive position." *Gibson* v. *Reynolds,* 172

F.2d 95, 98 (8th Cir. 1949).[19] *Accord, Dodez* v. *Weygandt,* 173 F.2d 965, 966 (6th Cir. 1949); *Nevarez Bengoechea* v. *Micheli,* 295 F. Supp. 257, 258 (D.P.R. 1969) ("Draft board proceedings are quasi-judicial and as such must conform to basic principles of due process of law."); *Benitez-Manrique* v. *Micheli,* 305 F. Supp. 334, 338 (D.P.R. 1969). See also *United States* v. *Stephens,* 245 F. 956, 963 (D. Del. 1917) ("The boards undoubtedly possess discretionary or quasi-judicial powers . . . ."), *aff'd* 247 U.S. 504 (1918).

d. The Moribund Myth of "Little Groups of Neighbors."

In the light of the foregoing demonstration of the powers, functions and processes of local boards, it is sheer fiction to contend that a personal appearance before the board is an informal "non-adversary and non-judicial" encounter between a registrant and his neighbors. See Government's brief, pages 36, 39. If it were ever true that local boards consisted of "little groups of neighbors" getting together informally with a young man from the neighborhood, whom they all had known since infancy, for the purpose of arriving at a mutual consensus on what is best for him and best for the country, it has been conclusively demonstrated that those halcyon days are gone.

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[19] The court analogized draft board members to a variety of other administrative officials, including members of the United States Parole Board, Warden of a Federal Penitentiary, Director of Bureau of Prisons, officials of the Home Owners Loan Corporation, Chairman of the Tariff Commission, and Deputy Fire Marshal. It held local board members and other draft personnel to be quasi-judicial officers because they "must fairly, fearlessly, freely and conscientiously determine the personal destinies of a sector of the American people, probably greater in number than the combined number of all of those affected by the discharge of the official duties of all of the officers first above enumerated." 172 F.2d at 98.

This myth was exploded by the REPORT OF THE NATIONAL ADVISORY COMMISSION ON SELECTIVE SERVICE (the Marshall Commission), IN PURSUIT OF EQUITY: WHO SERVES WHEN NOT ALL SERVE? (1967) (hereinafter "REPORT"), which revealed that the comfortable concept of personalized treatment by boards of neighbors has withered in our increasingly technological and urbanized society:

> "However universally valid this personalized concept might have been in the past, only in rural areas does it appear to be true today. Urban board members usually work in anonymity—and indeed seem to look upon that anonymity as an advantage. Rarely it would seem do those on such a board actually know the men whom they are classifying on the basis of their records—and vice versa. After taking an extensive look into local board operations in one state, a team of researchers reported to the Commission: 'Very little evidence exists to suggest that the fact of drafting by local boards has more than symbolic significance, if that, in urban settings.'" REPORT, p. 20.

The abandonment of the "little groups of neighbors" concept was repeatedly pointed out in *The Selective Service System: Its Operation, Practices, and Procedures,* Hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 91st Cong., 1st Sess., October 29-November 13, 1969 (hereinafter "1969 Senate Hearings"). Included in the Record of those hearings was a study performed by Gary L. Wamsley entitled SELECTIVE SERVICE AND A CHANGING AMERICA (1969). In his study, Mr. Wamsley described how the "local" board concept had rapidly eroded in urban areas:

"In the six months encompassed by this study there was no instance observed in which board members knew a registrant or his family." (1969 Senate Hearings, p. 780).

A study by two staff members of the Marshall Commission, JAMES W. DAVIS, JR., AND KENNETH M. DOLBEARE, LITTLE GROUPS OF NEIGHBORS: THE SELECTIVE SERVICE SYSTEM (1969) (also printed in the Record of the 1969 Senate Hearings), cites many of the factors which depersonalize these so-called "local" boards. Aside from the wide gap between members and registrants in age, occupation and attitude, Davis and Dolbeare identified the residence of board members as a factor:

"One indicator of the validity of the little groups of neighbors image might be the extent to which local board members reside in the local board area. The study by Wamsley found that fully one-third of local board members did not live in their jurisdictions and only a few lived in a location that could be loosely construed as 'in the area.'" (1969 Senate Hearings, p. 765).

In the urban setting, where racial and ethnic homogeneity is usually a more important definition of "neighborhood" than geographical boundaries, the prevalence of white board members on draft boards in black neighborhoods makes a mockery of the "neighbors" concept. Wamsley illustrated this problem in his report:

"A major departure from the 'friends and neighbors' concept was found in a board covering a Negro neighborhood. There were no Negro members on the board and none of the members lived in the jurisdiction. The

> Chairman who was the only member residing even in the 'vicinity,' lived in perhaps the last 'all-white block' to be found near the neighborhood, and had stated on numerous occasions that he would resign before he would allow a Negro to sit on the board." (1969 Senate Hearings, p. 781).[20]

Registrants claiming prejudice by this procedure of classification by non-neighbors of different racial background have been unable to obtain relief because of the concept that even if improperly constituted such local boards have *de facto* authority.[21]

Because the regulation requiring that members of local boards "if at all practicable" be residents of the area where the board has jurisdiction (32 C.F.R. §1604.52(c)) was widely violated, there are many cases holding that improperly constituted local boards lack jurisdiction to classify registrants. *United States* v. *Cabbage*, —— F.2d ——, 3 S.S.L.R. 3179 (6th Cir. July 31, 1970); *United States* v. *Beltran*, 306 F. Supp. 385 (N.D. Cal. 1969); *United States* v. *Machado*, 306 F. Supp. 995 (N.D. Cal. 1969); *United States* v. *Lemke*, 310 F. Supp. 1298 (N.D. Cal. 1969); *United*

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[20] The Marshall Commission reported that there were no Negro members of local boards in the states of Alabama, Louisiana, or Mississippi, where the Negro percentages of the population were respectively 30.06, 31.9, and 42.0.

[21] *DuVernay* v. *United States*, 394 F.2d 979 (5th Cir. 1968), *aff'd by equally divided court* 394 U.S. 309 (1969); *Clay* v. *United States*, 397 F.2d 901 (5th Cir. 1968), *vacated and remanded on other grounds* 394 U.S. 310 (1969); *Sellers* v. *McNamara*, 398 F.2d 893 (5th Cir. 1968) *cert. denied sub nom. Sellers* v. *Laird*, 395 U.S. 950 (1969) (see dissenting opinion of Mr. Justice Douglas); see also *United States* v. *Brooks*, 415 F.2d 502 (6th Cir. 1969); *United States* v. *Johnson*, 302 F. Supp. 584 (M.D. Pa. 1969); *Gee* v. *Smith*, 306 F. Supp. 891 (N.D. Ga. 1969).

States v. *Clinton,* —— F. Supp. ——, Crim. No. 31857 (E.D. La. April 21, 1970); *United States* v. *Jones,* —— F. Supp. ——, 2 S.S.L.R. 3392 (C.D. Cal. October 14, 1969); *United States* v. *DeMarco,* —— F. Supp. ——, 2 S.S.L.R. 3204 (N.D. Cal. July 30, 1969); *United States* v. *McMillan,* —— F. Supp. ——, 2 S.S.L.R. 43 (C.D. Cal. 1969); *United States* v. *Brock,* —— F. Supp. ——, 3 S.S.L.R. 3125 (N.D. Cal. February 26, 1970).

Other courts, however, have refused to require that the residency requirements in the regulations be enforced. *Czepil* v. *Hershey,* 425 F.2d 251 (7th Cir. 1969) *cert. denied* —— U.S. ——, 39 U.S.L.W. 3149 (October 12, 1970); *Jessen* v. *United States,* 242 F.2d 213 (10th Cir. 1957); *United States* v. *Nussbaum,* 306 F. Supp. 66 (N.D. Cal. 1969); *United States* v. *Fisher,* 307 F. Supp. 7 (D. Conn. 1969).

The answer of the Selective Service System to this raft of litigation has been simply to rescind the residency requirements of §1604.52(c) of the regulations. Executive Order No. 11555, 35 Fed. Reg. 14191 (1970), has deleted the requirement that local board members shall "if at all practicable" be residents of the area where the board has jurisdiction. Where the "little groups of neighbors" concept was previously a rapidly dissolving illusion, it is now officially abolished. The myth should not be allowed to survive.

e. Growing Recognition by This Court of Adjudicative Powers of Local Boards.

The history of selective service decisions by this Court, from the World War II era to the present, demonstrates an increasing recognition of the sweeping adjudicative powers of local boards and the adversary nature of a personal appearance. In *Estep* v. *United States,* 327 U.S. 114 (1946),

this Court insisted that selective service orders must be subject to some measure of judicial review in order to protect registrants against an "order which may be constitutionally invalid, or unauthorized by statute or regulation, or issued by mistake, or issued solely as the result of bias and prejudice." 327 U.S. at 126 (concurring opinion, Murphy, J.). In *United States* v. *Nugent,* 346 U.S. 1 (1953), it was ruled that a conscientious objector applicant was entitled to "a fair resume of any *adverse* evidence," *id.* at 6 (emphasis added), because conscientious objector claims involve "difficult analyses of facts and individualized judgments, and there is always a possibility that such a claim has been misjudged by the local board." *Id.* at 8. In *Dickinson* v. *United States,* 346 U.S. 389 (1953), the court noted the great leeway given local boards in hearing and considering different categories of evidence and invalidated local board action that was based on suspicion and speculation.

Two years later, on March 14, 1955, this Court decided four cases dealing with the selective service laws and their administration.[22] In *Witmer* v. *United States,* 348 U.S. 375, 381-382 (1955), the Court outlined the different types of "objective facts" and other evidence relevant to a determination of a conscientious objector applicant's "veracity." *Sicurella* v. *United States,* 348 U.S. 385 (1955), demonstrated that local boards can commit errors of law in interpreting the proper legal criteria for determining

[22] Chief Judge Hutcheson hailed "the four cases just decided . . . [as] a new Magna Charta of liberties in conscientious objector cases, a turning back from conviction by administrative absolutism to conviction only in accordance with the tradition of due process and the law of the land. . . ." *Olvera* v. *United States,* 223 F.2d 880, 882 (5th Cir. 1955).

conscientious objector classification. *Simmons* v. *United States,* 348 U.S. 397 (1955), and *Gonzales* v. *United States,* 348 U.S. 407 (1955), concerned the statutory right then in existence[23] of a conscientious objector applicant to a Department of Justice hearing. The court held it must be a "meaningful hearing," *Gonzales,* 348 U.S. at 415, where the registrant would be entitled to receive in advance a fair resume of the unfavorable evidence in order to enable him to "defend against the adverse evidence—to explain it, rebut it, or otherwise detract from its damaging force." *Simmons,* 348 U.S. at 405. Moreover, the registrant was entitled to a copy of the Department of Justice recommendation to the appeal board so that he could "muster his facts and arguments to meet . . . [the Government's] contentions." *Gonzales,* 348 U.S. at 414. A fair hearing, this court held, was "a fundamental safeguard" to which the registrant is entitled. *Simmons* v. *United States,* 348 U.S. at 406.[24]

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[23] Section 6(j) of the Universal Military Training and Service Act of 1951 provided for referral to the Department of Justice of all claims for conscientious objector classification which were denied by local boards and appealed. The Department was directed to conduct an "appropriate inquiry" and then "hold a hearing with respect to the character and good faith of the objections of the person concerned . . ." 65 Stat. 83. The Military Selective Service Act of 1967 completely eliminated this procedure.

[24] It is significant to note that all four of these 1955 decisions, as well as the 1953 *Nugent* decision, involved Department of Justice hearings under the pre-1967 statute. The right to appear with counsel at such hearings was acknowledged from the beginning. See *United States* v. *Nugent,* 346 U.S. at 4, footnote 3, and Record in *Nugent* case, page 54. See also, Smith and Bell, *The Conscientious Objector Program—A Search for Sincerity,* 19 U. PITT. L. REV. 695, 702 (1958). Thus, all of the discussion and ruling in conscientious objector cases prior to June 30, 1967, occurs in a context where the right to counsel is recognized at a hearing which is a significant part of the process. See discussion, *infra,* p. 73.

The next selective service decision by this Court was the second *Gonzales* v. *United States,* 364 U.S. 59 (1960). The court held, 5-4, that a conscientious objector applicant was not ordinarily[25] entitled to a copy of the hearing officer's report to the Department of Justice. The majority decision was essentially a close analysis of the factual questions before the board and an evaluation of whether there was a basis in fact for the board to have regarded some of the registrant's statements as inappropriately exaggerated.

In *Seeger* v. *United States,* 380 U.S. 163 (1965), this Court construed the statute to apply new criteria for qualification as a conscientious objector, thus providing a new legal test for boards to invoke. At the same time this court reiterated the importance of evaluating "the threshold question of sincerity," "a question of fact." 380 U.S. at 185.

Oestereich v. *Selective Service Board,* 393 U.S. 233, 238 (1968), in the course of striking down lawless reclassification action for punitive reasons, recognized that the customary activity of a local board is the "exercis[ing] of discretion . . . in evaluating evidence and in determining whether a claimed exemption is deserved." The companion *per curiam* decision of *Clark* v. *Gabriel,* 393 U.S. 256, 258 (1968), emphasized the local board's function, in conscientious objector classifications, of fact determination and exercise of discretion. *McKart* v. *United States,* 395 U.S.

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[25] As the court below observed, A. 35, fn. 2, the majority opinion in the second *Gonzales* case recognized that production of the hearing officer's report might be required under other circumstances where its withholding would result in "actual unfairness." 364 U.S. at 64. Applying *Gonzales,* the Second Circuit held that fairness required production in *United States* v. *Purvis,* 403 F.2d 555, 562 (1968).

185 (1969), listed a number of selective service classification questions which involved local boards in the exercise of discretion, 395 U.S. at 198, and ruled that the board had in this case made an incorrect legal interpretation of the statutory exemption for a sole surviving son.

This past term in *Gutknecht* v. *United States,* 396 U.S. 295 (1970), and in *Breen* v. *Local Board No. 16,* 396 U.S. 460 (1970), this Court struck down the delinquency regulations, 32 C.F.R. Part 1642, pointing out, *inter alia,* that their invocation by local boards involved determinations of fact and law totally without due process protections. In *Welsh* v. *United States,* 398 U.S. 333 (1970), the legal criteria by which boards must hear and determine claims of conscientious objection were further refined, and in *Mulloy* v. *United States,* 398 U.S. 410 (1970), this Court referred to the work of the board as being that of "evaluative determination" and pointed out that "Because of the narrowly limited scope of judicial review available to a registrant, the opportunity for full administrative review is indispensable to the fair operation of the Selective Service System." 398 U.S. at 416.

We respectfully submit that this brief review of the sixteen selective service decisions by this Court which have dealt with local board functions over the past twenty-five years reflects an increasingly critical observation of some of the low visibility decision-making processes of selective service local boards, and a corresponding articulation of procedural rights requisite to making an adversary adjudicative hearing into a fair hearing. It is particularly significant, in the light of the repeated admonitions by the Government that allowing the right of counsel would cause untold litigious interruptions and a "constructive paralysis" of the operations of the Selective Service System (Brief,

page 45), that these same arguments were repeated and reiterated in virtually every one of the prior cases, but uniformly rejected by this Court.

f. Judicial Recognition of the Unfairness of Adversary Hearings Without Counsel.

No decision of this Court has discussed the problem arising from the denial of counsel to a registrant at a personal appearance. However, a number of decisions by courts of appeals and district courts have recognized the inherent unfairness to the selective service registrant of the juxtaposition of adversary hearings with the prohibition of counsel. In *United States ex rel. Berman* v. *Craig,* 207 F.2d 888, 891 (3rd Cir. 1953), the court criticized the local board for treating registrants "as though they were engaged in formal litigation assisted by counsel." (Cited with approval by this court in *Simmons* v. *United States, supra.*) The same court, seventeen years later, criticized a local board for exhibiting "an adversary policy towards the defendant, as if he were an antagonist against whom the board was on guard rather than a young man dealing with his own government without the aid of counsel. . . ." *United States* v. *Turner,* 421 F.2d 1251, 1254 (3rd Cir. 1970). *Accord: United States* v. *Greene,* 220 F.2d 792, 794 (7th Cir. 1955); *United States* v. *Stafford,* 389 F.2d 215 (2d Cir. 1968).

Judge MacMahon, of the Southern District of New York, in two widely reported cases, has excoriated the denial of counsel and the Selective Service System view that the informal nature of the proceedings makes counsel unnecessary. *United States ex rel. Vaccarino* v. *Officer of the Day,* 305 F. Supp. 732, 736 (S.D.N.Y. 1969) (a "labyrinth of statutes and regulations, which are inscrutable not only

to laymen but also to most lawyers . . .")[26] In *Walsh* v. *Local Board No. 10,* 305 F. Supp. 1274, 1279 (S.D.N.Y. 1969), Judge MacMahon berated "the draft board's overzealous, high-handed and erroneous handling of this young man's plight. . . ."[27]

The frustrating dilemma facing district court judges reviewing local board files, and noting the harmful effect upon a registrant's rights of the prohibition of counsel when accompanied by limited judicial review, was aptly noted by Judge Doyle in *United States* v. *Wierzchucki,* 248 F. Supp. 788, 790 (W.D. Wisc. 1965):

> "It appears that the time may have come for re-evaluation of the constitutional implications of the closed circuit outlined above . . . .
>
> "This court considers that this motion to dismiss presents a true dilemma, that the issue it raises is

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[26] Judge MacMahon observed that it would take "a skilled lawyer" to "glean from the murky language" that a certain notice had informed petitioner of his rights to a personal appearance and an appeal. 305 F. Supp. at 735. Cf. *United States* v. *Harris,* 302 F. Supp. 1194, 1196 (D. Oreg. 1968).

[27] Judge MacMahon observed further:

> "[I]t is this kind of mistreatment which has alienated the youth of the nation, bred disrespect for law, sparked the disorders which have torn a gap between generations and ripped open the very structure of society. It feeds the clamor for abolition of the whole selective service system, from top to bottom, not only by mounting numbers of defiant young men, but also by the President and many members of congress, where no less than 43 bills to change the draft law are pending. At the very least, those entrusted with the awful power of conscripting the nation's young men into the armed forces in time of war or other military venture owe a duty of the most searching examination of the facts, scrupulous fairness, sensitive care, compassionate hearing, patient consideration, cautious action and deliberate and rational decision within the law. We afford no less to the worst criminal in our society." *Id.*

genuine and profound, and that the resolution of the underlying issue cannot and should not be avoided."[28]

2. *Since a Personal Appearance Is an Adjudicative Hearing Affecting Substantial Rights, the Prohibition of Counsel Is in Violation of the Constitutional Right, Arising From the Fifth Amendment, to Minimum Standards of Due Process at Such a Hearing.*

a. An Adjudicative Hearing Is Not Lawful Unless at Least the Constitutionally Minimum Standards of Due Process Are Afforded.

(1) We have demonstrated above that a personal appearance is substantially similar in all vital respects to any other adjudicative hearing by an administrative agency. This Court, on numerous occasions, has declared that certain minimum due process rights are constitutionally guaranteed to "those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities." *Morgan* v. *United States,* 304 U.S. 1, 18 (1938). Chief Justice Warren, writing for the court in *Hannah* v. *Larche,* 363 U.S. 420, 442 (1960), held:

> ". . . when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process."

"This Court has been zealous to protect these rights from erosion . . . not only in criminal cases . . . but also in all

[28] Cited with approval in *United States* v. *Freeman,* 388 F.2d 246 (7th Cir. 1967). See also *United States* v. *Schwartz,* 143 F. Supp. 639, 640 (E.D.N.Y. 1956) (failure to provide legal advisors "for counsel as to his rights," as required by regulation then in effect, deprives registrant of valuable rights and requires finding of not guilty).

types of cases where administrative and regulatory actions were under scrutiny." *Greene* v. *McElroy,* 360 U.S. 474, 497 (1959). It was pointed out in *Hannah* v. *Larche, supra,* that the well-known distinction in administrative law between administrative agencies acting in a rule-making or investigative capacity, and agencies performing an adjudicatory function, had specific due process consequences. Consequently, the Court ruled that certain due process rights were not available in the investigatory and fact-finding proceedings of the Civil Rights Commission, since such rights were not customarily available "when Governmental action does not partake of an adjudication." 363 U.S. at 442.[29] The court elaborately discussed the differences between the two kinds of proceedings and explained that the traditional safeguards of due process which were held requisite in *Morgan* v. *United States, supra; Greene* v. *McElroy, supra;* and *Joint Anti-Facist Refugee Committee* v. *McGrath,* 341 U.S. 123 (1951), were all because "the government agency involved in each was found by the Court to have made determinations in the nature of adjudications affecting legal rights." *Hannah* v. *Larche,* 363 U.S. at 451.

It could hardly be contested that a selective service registrant at a personal appearance before his local board is involved in a "proceeding aimed at the control of [his] activities." *Morgan* v. *United States, supra.* It is, likewise, indisputable that a local board at a personal appearance makes "binding determinations which directly affect the legal rights of individuals." *Hannah* v. *Larche, supra.*

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[29] A limited right of counsel, including the right to appearance in person with the person called before the Commission, and to render advice concerning constitutional rights, was nevertheless recognized by the Commission. *Id.* at 431.

(2) That an administrative agency, for all its uncircumscribed rule-making or investigatory power, cannot adjudicate personal or property rights without providing the essentials of a fair hearing is virtually a first principle of administrative law. This principle has been applied in a large variety of administrative proceedings by this Court and by lower federal courts. See, e.g., *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (termination of welfare benefits); *Londoner* v. *City of Denver*, 210 U.S. 373 (1908) (tax assessment);[30] *Goldsmith* v. *United States Board of Tax Appeals*, 270 U.S. 117 (1926) (license rights);[31] *United States* v. *Abilene & So. Ry.*, 265 U.S. 274 (1924)[32] (public utility rates);[33] *Gonzalez* v. *Freeman*, 334 F.2d 570 (D.C. Cir. 1964) (debarment of Commodity Credit contractor);[34] *Kwong Hai Chew* v. *Colding*, 344 U.S. 590

[30] See also *Lipke* v. *Lederer*, 259 U.S. 557 (1922); *Central of Georgia Ry.* v. *Wright*, 207 U.S. 127 (1907); cf. *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337 (1937); *McGregor* v. *Hogan*, 263 U.S. 234 (1923).

[31] See also *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96 (1963); *Bratton* v. *Chandler*, 260 U.S. 110 (1922); *Hornsby* v. *Allen*, 326 F.2d 605 (5th Cir. 1964).

[32] "Nor was the proceeding under review any the less an adversary one because the primary purpose of the Commission was to protect the public interest. . . ." 265 U.S. at 289, per Cardozo, J.

[33] See also *Railroad Commission of California* v. *Pacific Gas & Electric Company*, 302 U.S. 388 (1938); *Morgan* v. *United States*, *supra*; *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U.S. 292 (1937); *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio* (No. 1), 294 U.S. 63 (1935).

[34] Then Circuit Judge Burger pointed out that "debarment is not intended to punish but is a necessary 'means for accomplishing the congressional purpose' of Commodity Credit to 'aid in the development of foreign markets for, agricultural commodities.'" *Id.* at 577. This is a succinct refutation of the baseless contention made in the Government's brief (p. 39) that due process rights need not be afforded selective service registrants because the purpose of the personal appearance and classification is not "punitive."

(1953)[35] (deportation of alien);[36] *Escalera* v. *New York City Housing Authority,* 425 F.2d 853 (2d Cir.), *cert. denied* —— U.S. ——, 39 USLW 3149 (1970) (termination of public housing tenancy and imposition of additional rent charges); *Parker* v. *Lester,* 227 F.2d 708, 716 (9th Cir. 1955) (termination of merchant seaman's employment: "When it is proposed to take from a citizen through administrative proceedings some right which he otherwise would have, it has always been held that the constitutional requirement is that he shall be afforded notice and an opportunity to be heard.").[37]

In the light of the foregoing, the suggestion in the Government's brief (p. 36, n. 25) that due process might be satisfied without an opportunity to appear in person appears almost incredible. This Court, in *Goldberg* v. *Kelly, supra,* expressly held that the due process clause of the Fifth Amendment guaranteed certain procedural rights, the most fundamental of which was the right to be heard and to be heard in a meaningful manner. 397 U.S. at 267-268.[38]

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[35] ". . . not even Congress may expel him without allowing him a fair opportunity to be heard." 344 U.S. at 598.

[36] See also *Wong Yong Sung* v. *McGrath,* 339 U.S. 33, 50 (1950) ("When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality.")

[37] See also *Greene* v. *McElroy, supra.*

[38] The case cited in the Government's brief (at n. 25), *Federal Communications Commission* v. *WJR,* 337 U.S. 265, 275-77 (1949), presumably in support of its suggestion that a personal appearance could be dispensed with entirely, is specifically distinguished by this court in *Goldberg* v. *Kelly, supra,* n. 15, as one not involving fact-finding or fact determination.

b. The Constitutionally Minimum Standards of Due Process Require Recognition of the Right to Appear With Counsel.

(1) The indisputable place of counsel in the administrative adjudicatory process is so widely acknowledged and recognized that it is unusual to find a modern case[39] where a court is called upon to rule on this question. Most cases involving due process rights before administrative agencies involve a factual setting where some right to counsel was acknowledged or assumed, and the questions to be decided were what additional due process rights were required.[40] In *Goldberg* v. *Kelly, supra,* this Court held, without any elaboration, as if to signify that it was virtually self-evident, that any enunciation of the due process rights of welfare recipients would be meaningless unless the right to counsel were included. 397 U.S. at 270.[41]

Decisions of this court dealing with the due process rights of juveniles have made it very clear that even in these noncriminal proceedings the right to counsel was absolutely necessary to insure fair treatment. See *In re Gault,* 387 U.S. 1 (1966); *Kent* v. *United States,* 383 U.S.

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[39] As long ago as 1877, it was stated that ". . . however much the forms of proceeding or the nature of the tribunal may be changed, due process of law must necessarily include each and all of these requisites" [including "right to counsel"]. STORY ON THE CONSTITUTION (Cooley Ed.), at 668.

[40] See, e.g., *Greene* v. *McElroy, supra; Hannah* v. *Larche, supra; Morgan* v. *United States,* 304 U.S. at 16; *United States* v. *Nugent,* 346 U.S. at 4, n. 3 (1953).

[41] The Government's brief, after unconvincingly attempting to distinguish *Goldberg* v. *Kelly* (p. 48), then proceeds to criticize the decision, particularly the court's citation of *Powell* v. *Alabama,* 287 U.S. 45 (1932), p. 48, n. 39.

541 (1966). This Court held in *Gault* that "the juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings . . . ." 387 U.S. at 36. It is respectfully submitted that the selective service registrant, whether an 18- to 20-year-old "juvenile" or a 21- to 26-year-old "adult," likewise needs the assistance of counsel for these very same purposes. In *Kent* v. *United States, supra,* a decision rendered by this Court prior to the declaration of full due process standards in *Gault,* the Court observed that it might even be sufficient for a hearing in a juvenile case to provide a lesser degree of due process than "the usual administrative hearing;" but the court made it clear that even under this lesser standard the right of counsel was so primary that it must be recognized. 383 U.S. at 561.[42]

Other federal agencies where the question of the right to be represented by counsel has been raised have, with the sole exception thus far of the Selective Service System, been uniformly admonished by the courts to allow the presence of counsel. See *Bowles* v. *Baer,* 142 F.2d 787, 789 (7th Cir. 1944) (Circuit Judge, later Mr. Justice, Minton held it essential as part of any hearing that "The parties are entitled to be present in person and by counsel . . . ."). *Accord*: *Hyun* v. *Landon,* 219 F.2d 404, 406 (9th Cir. 1955), *aff'd* 350 U.S. 990 (1956) (deportation proceeding; " . . . indispensable to a fair hearing are reasonable notice, the

[42] The primacy of the right to counsel was emphasized by Mr. Chief Justice Schaefer of the Illinois Supreme Court, in *Federalism and State Criminal Procedure,* 70 HARV. L. REV. 1, 8 (1956): "Of all the rights that an accused person has, the right to be represented by counsel is the most pervasive, for it affects his ability to assert any other rights he may have."

right to examine witnesses and to testify and to present witnesses and to be represented by counsel . . . .").[43]

In a series of cases involving the rights of parolees at parole revocation hearings, the Court of Appeals for the District of Columbia has held that the statutory right of a parolee to appear before the parole board for such purpose would be totally ineffective and meaningless without the right to counsel. *Fleming* v. *Tate,* 156 F.2d 848 (D.C. Cir. 1946); *Moore* v. *Reid,* 246 F.2d 654 (D.C. Cir. 1957); *Hyser* v. *Reed,* 318 F.2d 225 (D.C. Cir. 1963). In *Fleming* v. *Tate, supra,* the court reversed an administrative practice of denying parolees the right to counsel which had been in existence since 1910. "The long administrative practice would be compelling upon us if we did not consider the statute plain and the issue vitally important." 156 F.2d at 851. *Fleming* v. *Tate* is often described as being based simply on the words of the statute and without any constitutional gloss. See *Hyser* v. *Reed, supra.* However, the court in *Fleming* v. *Tate* gave explicit constitutional content to its holding: "These two features, the presence of counsel and the receipt of evidence, are the basic characteristics of our whole system of administration of justice." *Id.* at 850.[44]

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[43] See also *Yiannopoulos* v. *Robinson,* 247 F.2d 655, 657 (7th Cir. 1957); cf. *United States ex rel. Castro-Louzan* v. *Zimmerman,* 94 F. Supp. 22, 26 (E.D. Pa. 1950); *Ex parte Chin Loy You,* 223 F. 833, 838-839 (D. Mass. 1915) (although no absolute right to counsel in deportation proceedings, where counsel "seasonably requests the privilege of being present . . . during the taking of the evidence," refusal of the request denied a fair hearing.)

[44] In *Menechino* v. *Oswald,* —— F.2d ——, No. 34665 (2d Cir., August 5, 1970), a majority of the Second Circuit held that the acknowledged right of counsel in New York State parole revocation proceedings could not be extended to allow counsel at parole application hearings. Circuit Judge Feinberg dissented, holding that there was such a right under *Goldberg* v. *Kelly, supra,* and *Mempa*

In accord are a number of decisions of state courts, including the Supreme Court of Illinois, which held:

> "Even if the statute did not provide a right to counsel in a proceeding such as here, which could affect one's property rights, the right to counsel would be undeniable. Administrative as well as judicial proceedings are governed by fundamental principles and requirements of due process of law."

Brown v. *Air Pollution Control Board,* 11 Ill.2d 450, 454, 227 N.E.2d 754, 756 (1967); cited with approval in *Kammerer* v. *Board of Fire and Police Commissioners,* 44 Ill.2d 500, 256 N.E.2d 12, 14 (1970, per Mr. Justice Schaefer). See also *In re Henderson Harris,* 69 Cal.2d ——, 446 P.2d 148 (1968) (civil commitment proceedings); *Bancroft* v. *Board of Governors,* 202 Okla. 108, 210 P.2d 666 (1949) (In hearing where Board has power to revoke dentist's license, dentist may be represented by counsel.); *Berkshire Fine Spinning Associates* v. *Label,* 74 R.I. 6, 60 A.2d 871 (1948) (In proceeding under State Workmen's Compensation Law, employee could have counsel if requested.); *Wisconsin Telephone Co.* v. *Public Service Commission,* 232 Wisc. 274, 287 N.W. 122 (1939) (A legislative act conferring power upon Public Service Commission to issue order affecting rights of citizens without opportunity to be heard is invalid and the right to hearing includes counsel.);

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v. *Rhay,* 389 U.S. 128 (1967). However, the entire court agreed that the right to counsel was an essential ingredient of procedural due process under the following circumstances:

> "The type of interest protected by procedural due process . . . is usually one presently enjoyed, e.g., welfare benefits . . . occupation of premises . . . attendance at school . . . status as an alien immigrant . . . employment . . . or existence as a charitable organization. . . ." Slipsheet Opinion at 4089 (citations omitted).

People ex rel. the Mayor v. *Nichols,* 79 N.Y. 582, 588 (1880) ("[I]n no other way could the person sought to be removed [from office] have a due hearing or 'opportunity to be heard'."); *People ex rel. Ellett* v. *Flood,* 64 App. Div. 209, 71 N.Y. Supp. 1067 (3rd Dept. 1901); *Almon* v. *Morgan County,* 245 Ala. 241, 16 So.2d 511 (1944) (Procedural due process, whether in administrative authority or court, includes right to counsel if desired.); *Bd. of Education* v. *Kennedy,* 256 Ala. 478, 55 So.2d 511 (1951) (In hearing before Board of Education for dismissal of teacher, due process includes right to counsel.).

Until June 30, 1967, there was an acknowledged right to counsel for conscientious objector applicants appearing in person before the Department of Justice hearing officer. See *United States* v. *Nugent, supra,* 346 U.S. at 4, n. 3; *Storey* v. *United States,* 370 F.2d 255 (9th Cir. 1966); Smith & Bell, *The Conscientious Objector Program—A Search For Sincerity,* 19 U. PITT. L. REV. 695, 702 (1958); cf. *Petersen* v. *Clark,* 289 F. Supp. 949, 952 (N.D. Cal. 1968) (counsel allowed to appear at local board). The right to be accompanied and advised by counsel at hearings occurring at this vital stage[45] of adjudication of conscientious objector claims may well have ameliorated to some extent the prohibition against counsel at the local board personal appearance. Since mid-1967, however, a selective service registrant has been totally stripped of any right to be accom-

[45] "Observers sympathetic to the problems of the conscientious objector have recognized that this provision in the statute improves the system of review . . . ." *United States* v. *Nugent, supra,* 346 U.S. at 9. "As a result, a more objective and disinterested approach to granting exemptions can be expected." *United States* v. *Gearey,* 368 F.2d 144, 148 (2d Cir. 1966). See Macgill, *Selective Conscientious Objection: Divine Will and Legislative Grace,* 54 U. VA. L. REV. 1355, 1380, n. 98 (1968).

panied and advised by counsel when he is face-to-face with those who must decide his fate.

(2) Without any real specification or explanation, the Government argues at various places in its brief (p. 38, p. 40, p. 47) that the right to counsel should not be recognized for selective service registrants because of some notion of selective service exceptionalism. Without identifying the nature and dimension of the exception, much less justifying it, the Government argues that regardless of the due process standards which may be applicable to other agencies, selective service is somehow different.

We respectfully submit that the Government is defending a totally baseless myth which was created by the Selective Service System for its own bureaucratic convenience. As we have shown above, in all material respects selective service local boards make decisions affecting personal and property rights no differently from any other administrative agency. Yet, because of the sedulous propagation of selective service mythology, the Selective Service System alone, of dozens, even hundreds, of federal administrative agencies, appears to be the only administrative agency whose regulations presume explicitly to prohibit the appearance of counsel. We list in the footnote[46] thirty-four federal

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[46] The right to be represented by counsel is guaranteed by statute in proceedings before the Civil Aeronautics Board, 49 U.S.C.A. 1481; Civil Rights Commission, 42 U.S.C.A. 1975a; Indian Claims Commission, 25 U.S.C.A. 70n; Interstate Commerce Commission, 49 U.S.C.A. 17(12); Longshoremen's and Harbor Workers Compensation Board, 33 U.S.C.A. 919; National Railroad Adjustment Board, 45 U.S.C.A. 153 j; Veterans Administration, 38 U.S.C.A. 3404.

Regulations acknowledge the right to counsel in the Atomic Energy Commission, 10 C.F.R. 2.713; Board of Immigration Appeals, 8 C.F.R. 3.1; Building and Defense Services Administration, BDSA Reg. 5, Sec. 8; Civil Service Commission, 5 C.F.R. 22.601;

administrative agencies where the right to counsel is guaranteed by statute and/or regulations. Moreover, appellee's counsel respectfully advise the court that an exhaustive study has been made of the various federal agencies and there does not appear to be a single instance, other than selective service, where the right to counsel is expressly prohibited. "This near-uniform judgment of the Nation," see *Baldwin* v. *New York*, 399 U.S. 66, 72 (1970), should, in logic, place some reasonable obligation upon those who would justify this unitary exception to come forward and provide cogent reasons for its existence.[47] But, as we

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Civil Service Commission (Voting Rights Program), 45 C.F.R. 801.308; Commodity Exchange Commission, 17 C.F.R. 0.61; Delaware River Basin Commission, 18 C.F.R. 401.42; Employees Compensation Appeals Board, 20 C.F.R. 501.11; Federal Aviation Administration, 14 C.F.R. 13.33; Federal Communications Commission, 47 C.F.R. 1.22; Federal Deposit Insurance Corporation, 12 C.F.R. 308.2; Federal Housing Administration, 24 C.F.R. 200.192; Federal Maritime Commission, 46 C.F.R. 136.07-35; Federal Power Commission, 18 C.F.R. 1.4; Federal Reserve Board, 12 C.F.R. 263.3; Federal Tariff Commission, 19 C.F.R. 201.15; Federal Trade Commission, 16 C.F.R. 4.23; Federal Water Pollution Control Administration, 18 C.F.R. 606.8(d); Food and Drug Administration, 21 C.F.R. 2.58; Foreign Claims Settlement Commission, 45 C.F.R. 500.1; National Labor Relations Board, 29 C.F.R. 102.38; Packers and Stockyards Act—Hearings Under Department of Agriculture, 9 C.F.R. 202.11c; Patent Office, 37 C.F.R. 1.31; Securities Exchange Commission, SEC Rules of Procedure #2; Small Business Administration, 13 C.F.R. 103.13; Subversive Activities Control Board, 28 C.F.R. 201.5; Tennessee Valley Authority, 18 C.F.R. 301.2(f) 2.

[47] Cf. Mr. Justice Frankfurter's concurring opinion in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 149, 172 (1951):

> "That a hearing has been thought indispensable in so many other situations, leaving the cases of denial exceptional, does not of itself prove that it must be found essential here. But it does place upon the Attorney General the burden of showing weighty reason for departing in this instance from a rule so deeply imbedded in history and in the demands of justice."

believe we have demonstrated, there does not exist any basis for this exception in law or in fact.

Nevertheless, given the existence of some twenty years of selective service mythology, it is not surprising that a body of case law has developed which is said to be supportive of the selective service exception. See Government's brief, pages 36-38. It is surprising, however, how little real discussion and analysis there is in any of these cases and how readily distinguishable they are for a number of reasons.

(3) The cases cited by the Government appear to be an impressive array in support of the proposition that the Constitution does not compel that a registrant be permitted an attorney in Selective Service proceedings. Upon closer examination, however, this array becomes much less impressive; indeed, none of the cases cited by the Government, and none which counsel for appellee have been able to discover, can be said to have devoted to this issue any semblance of the serious consideration which it requires.

Both *United States* v. *Schwartz*, 143 F. Supp. 639 (E.D. N.Y. 1956), and *United States* v. *Wierzchucki*, 248 F. Supp. 788 (W.D. Wisc. 1965), alleged by the Government to contain dicta in support of its contentions, should properly be read in precisely the opposite light. *Schwartz* dealt with a defendant who asserted that he had been prejudiced because his local board had failed to post the names of advisors to registrants, at a time when Section 1604.41 of the Regulations (32 C.F.R. 1604.41) made the appointment of advisors and the posting of their names mandatory. The court held that, *because* of the denial of counsel before the local board, the registrant "must depend on the advisors for counsel

as to his rights to a proper classification," 143 F. Supp. at 640, and that failure to comply with the regulation was thus so prejudicial as to require a finding of not guilty. No opinion expressing such scrupulous concern that the registrant have proper advice as to his rights can be taken to support the contention that the registrant may be denied counsel even where the appointment of advisors has become discretionary.

Likewise, *United States* v. *Wierzchucki,* discussed *supra* at p. 55, can hardly be said to support the Government's position; the court merely notes the fact of denial of counsel, and suggests great dissatisfaction with it. Finding the record insufficiently developed, however, the court asserts that it is unable to reach a decision on the point, and does not do so.

A substantial number of the cases which the Government cites devote not more than a sentence or two to the counsel issue, often a mere conclusory statement. Perhaps most extreme is *United States* v. *Tantash,* 409 F.2d 227, 228 (9th Cir. 1967), in which the entire discussion of the point is as follows: "Appellant was not entitled to be provided with legal assistance in the selective service process. 32 C.F.R. 1624.1(b)." Other cases disposing of the counsel question in a similarly cavalier manner, occasionally offering one or two supporting precedents, but giving the issue no discussion whatever, include *Cassidy* v. *United States,* 428 F.2d 585 (8th Cir. 1970); *United States* v. *Evans,* 425 F.2d 302 (9th Cir. 1970); *United States* v. *Willis,* 409 F.2d 830 (5th Cir.), *cert. denied* 396 U.S. 864 (1969); *Chaney* v. *United States,* 406 F.2d 809 (5th Cir.), *cert. denied* 396 U.S. 867 (1969); *Madera* v. *Board of Education,* 386 F.2d 778 (2d Cir. 1967), *cert. denied* 390 U.S. 1028 (1968), which was not

a selective service case;[48] *United States* v. *Mendoza,* 295 F. Supp. 673 (E.D.N.Y. 1969); *United States* v. *Heljenek,* 275 F. Supp. 579 (E.D. Pa. 1967); *United States* v. *Kovalchick,* 255 F. Supp. 826 (E.D. Pa. 1966).

Others of these cases appear to deal only with the right to counsel in the selective service appellate process, such as both the *Capson* cases, *United States* v. *Capson,* 347 F.2d 959 (10th Cir.), *cert. denied* 382 U.S. 911 (1965), and *Capson* v. *United States,* 376 F.2d 814 (10th Cir.), *cert. denied* 389 U.S. 901 (1967); and *Imboden* v. *United States,* 194 F.2d 508 (6th Cir.), *cert. denied* 343 U.S. 957 (1952).

Moreover, the *Capson* cases both dealt only with the question of whether the right to counsel in criminal cases guaranteed by the Sixth Amendment extended to selective service proceedings; this is made clear at the very outset of the earlier of the two, *United States* v. *Capson, supra,* in the court's statement that Capson's claim was "That he was denied the assistance of counsel, as guaranteed by the VI Amendment . . . " 347 F.2d at 960. Other cases considering only the Sixth Amendment contention include *Camp* v. *United States,* 413 F.2d 419 (5th Cir.), *cert. denied* 396 U.S. 968 (1969); *McCoy* v. *United States,* 403 F.2d 896 (5th Cir. 1968); *Haven* v. *United States,* 403 F.2d 384 (9th Cir. 1968), *cert. dismissed* 393 U.S. 1114 (1969); *Merritt* v. *United States,* 401 F.2d 768 (5th Cir. 1968); *Nickerson* v. *United States,* 391 F.2d 760 (10th Cir.), *cert. denied* 392 U.S. 907 (1968).

In none of these cases is serious attention given even to the Sixth Amendment contention. See *infra,* pp. 81-88. Typical of the opinions is that in *Merritt,* asserting that

[48] "Furthermore," as the court below correctly noted, "to the extent that the *Madera* case relies on Selective Service cases for authority it is for present purposes circular." A. 39.

"The procedure under the draft law and classification by a local board is in no way penal, nor is it a criminal trial with the right to be represented by counsel, and to call, examine, and cross-examine witnesses." 401 F.2d at 769. There is no discussion of the many quasi-judicial and adjudicatory functions which are in fact performed by the local board, as discussed *supra* pp. 43-45; the language is directly traceable to dictum in *Ex parte Stanziale,* 138 F.2d 312, 314 (3rd Cir.), *cert. denied sub nom. Stanziale* v. *Paullin,* 320 U.S. 797 (1943), a wartime case which expressed no opinion as to the constitutionality of the denial of counsel, but merely was acknowledging the existence of the regulations and the state of war.[49]

In some of the cases, it was held that denial of counsel could not be alleged as a ground of prejudice, because no request for counsel had been made at the time of appearance; this is so in *United States* v. *Richmond,* 274 F. Supp. 43 (C.D. Cal. 1967); elsewhere, not only had counsel not been requested, but the registrant did not allege that lack of counsel had prejudiced him. In many of the latter cases, as in *Stanziale, supra,* the courts cannot be said to have expressed any opinion on the constitutionality of the denial of counsel; they merely recited the existence of the prohibition in outlining the situation faced by the registrant. Representative of the utterly gratuitous remarks on counsel

[49] It should further be remembered that this 1943 case, which the Government cites repeatedly (Brief pp. 38-39) as its standard-bearer, was decided at a time when there was virtually no judicial review of selective service cases; *Estep* v. *United States,* 327 U.S. 114, was not decided until three years later. The completely different jurisprudential world prevailing at the time of the *Stanziale* decision is vividly demonstrated by the court's remarks that the Government had won all but three cases since the adoption of the Act in 1940—and that the Government had enjoyed the same statistical experience with the World War I draft act. 138 F.2d at 314, n. 5.

occasionally to be found in this area is that in *United States* v. *Pitt,* 144 F.2d 169, 172 (3rd Cir. 1944):

> "While a denial of the right to counsel in a judicial proceeding would constitute a denial of due process, the proceedings before the selective service agencies are not within that category. It will be observed moreover that . . . he at no time requested the Board to permit counsel to appear in his behalf. *He does not assert that his lack of counsel is evidence of denial of due process.*" (Emphasis added.)

Similar to *Pitt* in the immateriality of their remarks on counsel are *Lehr* v. *United States,* 139 F.2d 919 (5th Cir. 1943), and *United States* v. *Miller,* 143 F. Supp. 712 (N.D. W.Va.), *aff'd* 239 F.2d 148 (4th Cir. 1956).

In light of the above discussion, it is apparent that none of the cases so far considered has given any real consideration to the contention that the denial of counsel in selective service proceedings constitutes a deprivation of the due process of law guaranteed by the Fifth Amendment. The five remaining cases of those raised by the Government have indeed taken cognizance of the issue, but none of them in any persuasive way.

Thus, the exceedingly confused opinion in *United States* v. *Dicks,* 392 F.2d 524 (4th Cir. 1968) rejects the due process claim without coming to grips with it at all. Having already discounted defendant's claims that he had been denied due process by various other acts of the board, the court states in its discussion of the counsel question:

> "As already stated, there has been no violation of the registrant's rights under the Fifth Amendment since he was accorded due process of law.
>
> • • • • •

> "The record before this Court leads to the irrefutable conclusion, both in law and in fact, that this defendant was accorded due process." 392 F.2d at 528.

Nowhere does the court appear even to recognize, let alone discuss, the possibility that the denial of counsel, in and of itself, might be a denial of due process.

The opinion in *United States* v. *Mientke,* 387 F.2d 1009 (7th Cir. 1967), *cert. denied* 390 U.S. 1011 (1968), is similar; although defendant raised both Fifth Amendment and Sixth Amendment claims, the court does not appear to deal with the counsel question in a Fifth Amendment context. Rather, it bases its opinion solely on the assertion that "The proceedings before the Local Board are not converted from administrative in nature to criminal by virtue of the defendant's having subsequently been accused of the crime of failing to obey an order to report for civilian duty." 387 F.2d at 1011. There is no consideration of the applicability of due process standards to "administrative" as well as to "criminal" proceedings.

United States v. *Sturgis,* 342 F.2d 328 (3rd Cir.), *cert. denied* 382 U.S. 879 (1965), merely presents a conclusory assertion which does not follow from its premise:

> "[T]he proceedings before the Board are non-judicial in nature and they are clearly non-criminal. The appellant here was neither a suspect nor an accused and he was appearing before Local Board No. 121, which was giving him a hearing only in an administrative proceding. Therefore, to extend the right of counsel to an individual who is concerned in a non-judicial and non-criminal proceeding would be an unwarranted extension of the individual's right to counsel." 342 F.2d at 332.

The only authority offered for the above holding is that, in *United States* v. *Pitt, supra,* according to the court, it had "directly ruled the point that the denial of counsel before the Local Board is not a denial of due process." 342 F.2d at 332. *Pitt,* of course, did not "directly rule" on the point; nor does this court nor any other of the many courts relying directly on the World War II-era decisions make more than the briefest mention of the intervening two decades of developing concepts of due process. See discussion *supra* at pp. 60-67. Also omitted is any consideration of the continuing reduction of the amount and quality of advice afforded to registrants by the Selective Service System itself.[50]

Peterson v. *United States,* 173 F.2d 111 (6th Cir.), *cert. denied* 337 U.S. 925 (1949), devotes a single brief paragraph to the due process issue. Because of its age, it is subject to much the same criticism as is *Pitt, supra,* on which it relies; nor does it support its holding with any more cogent argument than the conclusory statement that "He was not entitled to a judicial trial before the draft boards, but rather to judicial review, in the criminal proceedings, of the board's administrative action, as was given him in this case." 173 F.2d at 115.

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[50] Under the 1940 Act, the regulations provided for three-member advisory boards for all registrants (32 C.F.R. (1940 Supp.) 601.145; 32 C.F.R. (1943 Cum. Supp.) 603.41). From 1948 to 1955, the Regulations made it mandatory that each local board have one or more advisors to registrants, wholly separate from the appeal agents, whose sole duty was to the registrants (32 C.F.R. 1604.41, as promulgated by Exec. Ord. No. 9979 of July 20, 1948, 13 Fed. Reg. 4179; 32 C.F.R. (1951 Rev.) 1604.41). Since 1955, however, the appointment of such advisors has only been optional (32 C.F.R. 1604.41, as amended by Exec. Ord. No. 10594 of Jan. 31, 1955, 20 Fed. Reg. 735). See the discussion of present availability and adequacy of local board advisors, *infra* at pp. 93-97.

Niznik v. *United States,* 173 F.2d 328 (6th Cir.), *cert. denied* 337 U.S. 925 (1949), is subject to precisely the same criticisms as *Peterson, supra;* moreover, the *Niznik* court appears to have proceeded on the assumption that the actions of the board are subject to much broader review than is generally thought to be the case, as it stated that even if a basis in fact could be found for the board's classification, any question of prejudice on the part of the board might properly be put to the jury and be considered as grounds for an acquittal. 173 F.2d at 326. Cf. *Estep* v. *United States,* 327 U.S. 114 (1946); see also the discussion of judicial review, *infra* at pp. 81-83.

It is manifest from the preceding examination of cases which are purported to have held that denial of counsel in the selective service process does not constitute an abridgement of constitutionally guaranteed rights, that the only conclusion which may be drawn is that the issue has never been given the serious and careful consideration warranted by a matter of such major constitutional dimension. No case has given more than the barest minimum of attention to the issues here involved, none has taken more than the most grudging notice of the developing and expanding concepts of due process and right to counsel, and none has offered any persuasive argument to support the denial of such important safeguards.

(4) The Government strains to distinguish, as it necessarily must, two recent non-criminal right of counsel decisions of this Court, *In re Gault,* 387 U.S. 1 (1966), and *Goldberg* v. *Kelly,* 397 U.S. 254 (1970) (Brief, pp. 47-49). It argues that *Gault* is wholly inapplicable because juvenile court proceedings are "adversary and potentially puni-

tive" (p. 48).[51] That proceedings which occur at a local board personal appearance are plainly adversary is conclusively established in a prior section of this brief. See pp. 37-66, *supra*. That local board adjudicative proceedings are "potentially punitive" is evident from that which inevitably occurs when a conscientious objector applicant is rebuffed by the board and has no other effective means of judicial review than a defense to a criminal prosecution for induction refusal. See *infra*, pp. 83-86.

In its attempted distinction of *Goldberg* v. *Kelly*, *supra*, the Government concedes that welfare termination hearings are of necessity adversary, but persists in denying the obviously equally adversary nature of selective service proceedings. The Government extracts from *Goldberg* v. *Kelly* four functions of counsel which, it claims, demonstrate that counsel could not serve a similar valid function in selective service local board proceedings. But the Government's case proves its opposite, since the functions of counsel in a welfare termination hearing, as declared by this Court in *Goldberg* v. *Kelly*, and as conceded by the Solicitor General, apply with equal if not greater force at selective service local board hearings. As we have demonstrated, counsel are indeed needed to "delineate the issues," "present the factual contentions in an orderly manner," and "generally safeguard the interests of the recipient." *Goldberg* v. *Kelly*, 397 U.S. at 270-271; Government's brief

[51] Obviously, the Government cannot argue that juvenile court proceedings are different from selective service local board proceedings because the former are "criminal," since this court has plainly held that juvenile court proceedings of the type involved in the *Gault* case are, indeed, non-criminal but nevertheless entitled by the due process clause to the right of counsel. See *In re Gault*, *supra*, and *Kent* v. *United States*, *supra*.

p. 49.[52] It is abundantly clear that a selective service registrant, no less than the welfare recipient, is in need of professional legal assistance to delineate the issues, present the factual contentions in support of his claim in an orderly and persuasive manner, and generally safeguard his interests. We submit that the Government could hardly contest this rather self-evident proposition for any adversary proceeding. However, it persists in the propagation of the selective service myth that there is nothing adversary involved in a selective service local board personal appearance.

Not unexpectedly, the Government resorts to the familiar "parade of horribles" argument by a series of presumably horrifying rhetorical questions (Brief, p. 46), which seek to show that if a selective service registrant receives those procedural rights which this Court has declared are the entitlement of welfare recipients, *Goldberg* v. *Kelly, supra,* 397 U.S. at 269-271, the Selective Service System will be paralyzed and the nation will be left defenseless. The simple answer to all of this handwringing is that all that is involved in this case is the right to individually retained counsel at the personal appearance. But it is instructive

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[52] We have omitted from this delineation the other function of counsel at welfare termination hearings specified by this court in *Goldberg* v. *Kelly*, the role of counsel in conducting cross-examination. This is because there are not customarily any witnesses called by the Government at local board hearings, even though the local board has power to do so, 32 C.F.R. §1621.15.

In its attempt to belittle the possible usefulness of counsel in selective service proceedings, the Government contends that it cannot "be seriously argued that the presence of counsel is essential to the development of a suitable record for purposes of appeal . . ." Brief, p. 41. In making this statement, the Government appears to be utterly oblivious to the extensive remarks of this court in *Goldberg* v. *Kelly*, 397 U.S. at 269, n. 16, concerning the difficulties faced by the untutored and unsophisticated in preparing written submissions for appeals in administrative proceedings.

to note that one of the rhetorical questions: " . . . should the local board be required to state on the record its reasons for assigning a given classification . . . ?" has been answered decisively in the affirmative in at least eight of the circuits.[53]

The extent to which the Government is prepared to go in the propagation of the "non-adversary" myth is further revealed by its attempted reliance on *United States* v. *Nugent, supra,* Brief, pp. 49-51. It would appear that the Government is completely oblivious to the fact that the reason that *Nugent* was not a "right to counsel" case, Brief, p. 49, is that *Nugent* had an acknowledged right to counsel and the issue in the case was the extent of the additional procedural rights he should have. As we have pointed out previously, see *supra,* p. 64, and as revealed in this Court's opinion, 346 U.S. at 14, n. 3, Nugent had the right to counsel at his Justice Department hearing and was contending for the right to see the complete FBI reports, and not just a "fair resumé." 346 U.S. at 5-6.[54]

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[53] See *United States* v. *Deere,* 428 F.2d 1119 (2d Cir. 1970); *Paszel* v. *Laird,* 426 F.2d 1169 (2d Cir. 1970); *Scott* v. *Commanding Officer,* —— F.2d ——, 3 S.S.L.R. 3277 (3rd Cir. Sept. 15, 1970); *United States* v. *Broyles,* 423 F.2d 1299 (4th Cir. 1970); *O'Brien* v. *Resor,* 423 F.2d 594 (4th Cir. 1970); *United States* v. *James,* 417 F.2d 826 (4th Cir. 1969); *United States* v. *Washington,* 392 F.2d 37 (6th Cir. 1968), *United States* v. *Lemmens,* —— F.2d ——, 3 S.S.L.R. 3185 (7th Cir. Aug. 4, 1970); *Caverly* v. *United States,* 429 F.2d 92 (8th Cir. 1970); *Haughton* v. *United States,* 413 F.2d 736 (9th Cir. 1970); *United States ex rel. Brown* v. *Resor,* —— F.2d ——, 3 S.S.L.R. 3188 (10th Cir. July 21, 1970).

[54] Perhaps aware of the fact that Nugent had the right to counsel at his Department of Justice hearing, the Government finds it necessary to question whether the Department of Justice hearing was indeed a hearing. There is no other way to explain the typographically odd manner in which the word hearing is presented in quotation marks on the three occasions that the word is used in connection with the *Nugent* case. Brief, p. 50 and footnote 40, pp. 49-50.

Obviously, there is no issue in this case, as there was in *Nugent,* of "collateral attack" on testimony obtained in a prehearing investigation, since the local board is obliged to act only on material which is in the registrant's file, 32 C.F.R. §1623.1(b). Since the abandonment of the Department of Justice hearings, the special problems involved in FBI investigations and resumés thereof are no longer present. The problems facing the registrant before the board are precisely those with which counsel can assist him: delineating the issues, presenting the facts in an orderly manner, and generally safeguarding his interests. The Government has suggested no reason why counsel cannot play the same constructive and helpful role in a local board personal appearance as counsel played in thousands of Department of Justice hearings, such as that which was the subject of litigation on another point in *United States* v. *Nugent, supra.*[55]

The Government suggests that this Court should follow the "constitutional approach" which it claims was followed in *Nugent,* and that such approach is to balance the neces-

[55] Footnote 43 of the Government's brief (p. 51) suggests that the court below erred in not recognizing "that procedures of local board proceedings have undergone no basic change since the *Nugent* decision." See A. 35. We respectfully suggest that it is the Solicitor General who has misread the decision of the court below. Under the old procedures, a conscientious objector applicant had two personal confrontations, the first of which was his personal appearance before the local board, and the second his statutorily guaranteed Department of Justice hearing. Even though the recommendation of the hearing officer and of the Department of Justice was only advisory, this advice was almost invariably followed by the appeal board. See Smith and Bell, *supra,* at 702; *Gonzales* v. *United States,* 364 U.S. at 72. Now that the entire Department of Justice hearing procedure has been eliminated, it is indeed true, as the court below observed, that in terms of hearings or appearances, the one before the local board is determinative. Consequently, the Solicitor General misses the point in suggesting that personal appearances "now" are no more determinative than "they were then." Brief, p. 51, n. 43.

sity for the due process rights there contended for with the danger of "litigious interruption" to the Selective Service System. Brief, p. 51. To begin with, this argument as applied to this case answers itself, since obviously it was not contended that the right of counsel which *Nugent* possessed would cause litigious interruption. Moreover, it can hardly escape notice that opponents of increased due process rights, whether the right of counsel or otherwise, have always warned of litigious interuption and similar dangers.[56] One can agree that the Government's advocacy of a balancing test is here appropriate, but still must conclude that the interests of the individual far outweigh any genuinely harmful effect to any governmental interest. As this

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[56] In footnote 42, the Government accuses the court below of a "misleading" statement concerning *Greene* v. *McElroy, supra.* Once again, any misleading here is by the Government. The court below merely observed that this court in *Greene* v. *McElroy* did not follow the argument of "litigious interruption" which was made in *Nugent.* The court below did not say that the argument was rejected, since in fact *Greene* v. *McElroy* was decided on the basis of lack of Congressional authorization. See *Point II, supra.* But the court below was clearly correct in observing that in respect of that argument *"Nugent* was not followed in *Greene."* A. 35.

It is also noteworthy that the Government does not respond to the further point made by the court below concerning the spectre of litigious interruption, i.e., the fact that counsel participates in hearings with respect to members of all of the armed services who claim conscientious objector status, and have been so participating for the past several years. See: Department of Defense Directive 1300.6, ¶VIB4 (May 10, 1968); Army Regulation 635-20, ¶4b(3) (July 31, 1970); Army Regulation 135-25, ¶7b(3) (June 17, 1970) (providing procedures for conscientious objectors within the Army National Guard and Army Reserve); Air Force Regulation 35-24, ¶8b(4) (May 1, 1970); Coast Guard Commandant Instruction 1900.2, ¶5 (Oct. 7, 1968); Marine Corps Order 1306.16B, ¶7b(4) (June 18, 1969); Department of the Navy Bupers Instruction 1900.5, ¶3 (July 18, 1968). If our regimented military institutions can manage to survive notwithstanding the allowance of retained counsel at in-service conscientious objector hearings, it is respectfully submitted that the civilian institutions of the republic will not capsize if counsel are permitted to assist registrants at local board personal appearances.

court observed in *Goldberg* v. *Kelly, supra,* concerning the existence of right of counsel:

> "We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing." 397 U.S. at 271.

Finally, the Government relies on three other cases, all of which did indeed specifically deny the right of counsel at various investigatory proceedings. See *In re Groban,* 352 U.S. 330 (1957), *Anonymous* v. *Baker,* 360 U.S. 287 (1959), *Madera* v. *Board of Education,* 386 F.2d 778 (2d Cir. 1967), *cert. denied* 390 U.S. 1028 (1968). Each of these cases is readily distinguishable on the basis of the valid differences between investigatory proceedings and adjudicative proceedings which were explained by this Court in *Hannah* v. *Larche, supra,* and which we discuss at pp. 43-45 above. In each of these cases, either no adjudication of status or right was taking place, or if it was, it was basically subsidiary to the overall fact-finding investigation. Indeed, in the *Groban* case, this Court cautioned that the section of Ohio law under review "may contain a constitutional flaw if it should be construed to authorize the exclusion of counsel" at that point at which the proceeding changed from one of investigation to one of adjudication. 352 U.S. at 335. Likewise, in *Anonymous* v. *Baker,* this Court pointed out that preliminary investigations of possible misconduct by members of the New York Bar could be constitutionally held without counsel only because the investigations were *preliminary* in nature.[57]

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[57] The Court also noted that a certain public interest was served by the very anonymity of the proceedings, similar to the public interest involved in the secrecy of a grand jury proceeding. Moreover, the Court observed that the possibilities for abuse were limited by the fact that a high judicial officer presided at the investigation. 360 U.S. at 291, 296.

With respect to the New York City Board of Education Guidance Conference involved in *Madera* v. *Board of Education, supra,* the Court of Appeals found this even further removed from the status of an adjudicatory proceeding. The court clearly held that this was "a very preliminary investigation, if it can be considered an investigation at all." 386 F.2d at 785. The court observed further that due process might indeed require right to counsel "before a child is expelled from public school," *id.* at 788, but it was not called upon to resolve that question. There was no right to counsel at a disciplinary Guidance Conference, the Second Circuit held, because "after the conference, aside from a school reassignment, if any, a whole series of further investigations, hearings, and decisions must occur . . . ", *id.* at 785, before any of the child's rights might be affected.[58]

3. Because of the Narrowly Circumscribed Judicial Review of Selective Service Classification Actions and the Inevitable Criminal Prosecution for Induction Refusal Which Follows a Denial of a Conscientious Objector Application, a Conscientious Objector Applicant's Personal Appearance Before His Local Board Is a "Critical Stage" of the Pre-Prosecution Events During Which He Is Entitled to the Right of Counsel Under the Sixth Amendment.[59]

It is by now axiomatic in the field of selective service law, that the scope of judicial review is the narrowest known to

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[58] The court below observed that *Groban* and *Madera* were clearly distinguishable because in both instances the administrative action involved was nonadjudicative and nondispositive. A. 38-39. Curiously, the Government fails to meet this argument. Subsequent to *Madera,* the New York State Legislature has provided for the right to retained counsel at suspension proceedings. See N.Y. Education Law, §3214, Subdivision 6c, as amended, Ch. 307, McKinney's New York Session Laws 1969.

[59] The Government observes (Brief, p. 35) that neither the appellee nor the district court suggested that the Sixth Amendment

administrative law. The classification assigned by the local board may be overturned by a court only if it has "no basis in fact." Both the Selective Service System and the Department of Justice continually remind both the courts and defendants that the decisions of the local boards, made in conformity with the regulations, are final if they have a basis in fact, and that courts are not to search the records, sitting as "super draft boards"; the decision of the local board made in conformity with the regulations must be upheld even though it is erroneous. See generally, *Estep* v. *United States,* 327 U.S. 114 (1946); *Cox* v. *United States,* 332 U.S. 442 (1947); *Swaczyk* v. *United States,* 156 F.2d 17 *cert. denied* 329 U.S. 726 (1946); *Rempel* v. *United States,* 220 F.2d 949 (10th Cir. 1955); *Blalock* v. *United States,* 247 F.2d 615 (4th Cir. 1957); *De Remer* v. *United States,* 340 F.2d 712 (8th Cir. 1965). Typical of the long line of cases upholding this stringent scope of review is *United States* v. *Corliss,* 280 F.2d 808, 810-811 (2d Cir.), *cert. denied* 364 U.S. 884 (1960). There the Second Circuit held:

> "In discharging this unenviable task, courts must be mindful that 'The range of review is the narrowest known to the law,' [citing *Blalock, supra*]; . . . they may reverse the Appeal Board 'only if there is no basis in fact for the classification . . . ,' [citing *Estep, supra*] . . . ; and that '*any* fact which casts doubt on the veracity of the registrant is relevant,' *Witmer* v. *United States,* 348 U.S. 375, 381-2 (1955)." (Emphasis added.)

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has any applicability. It is clear, however, that appellee may urge before this court any additional grounds, constitutional or otherwise, for upholding the decision below. See *Dandridge* v. *Williams,* 397 U.S. 471, fn. 6 at 475-476 (1970).

See generally L. HERSHEY, LEGAL ASPECTS OF SELECTIVE SERVICE 53, fns. 33-40 (Revised ed. 1969).[60]

Consequently, the hearing before the local board is of vital importance because it is this critical stage at which the record is made, and from which there is only the most frustratingly narrow judicial review. See *United States* v. *Freeman,* 388 F.2d 246, 249 (7th Cir. 1967). See also, *Mulloy* v. *United States,* 398 U.S. 410 (1970). At the same time, because of the limited access to judicial review, see *Clark* v. *Gabriel,* 393 U.S. 256 (1968), and the well-known fact that most conscientious objector applicants must, as a matter of conscience, refuse induction if their claims are not sustained by the Selective Service System, virtually every conscientious objector case develops into a criminal prosecution for induction refusal. "A sincere claimant for conscientious objector status cannot turn to the habeas corpus remedy because his religious belief prevents him from accepting induction under any circumstances." *United States*

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[60] The position of the Selective Service System is stated in no uncertain terms in its authoritative guidebook for government appeal agents and prosecutors:

> "The United States Supreme Court has held that the courts are not to sit as super draft boards substituting their determinations for those of the classifying boards. Decisions of the boards made in conformity with the regulations are final even though erroneous. The administrative proceedings should be overturned only if there is a denial of basic procedural fairness or if the classification is without any basis in fact. The question of the preponderance of the evidence is not for trial anew and courts should not look for substantial evidence to support the classification. Courts are not to weigh the evidence to determine whether the classification was justified. They are confined to a review of the registrant's file in deciding whether there is a basis in fact. When a court finds a basis in the file for the board's action, that finding is conclusive." HERSHEY, *supra* at p. 71.

v. *Freeman,* 388 F.2d at 248-249. "A denial of a I-O claim will *usually* be decided in the courts, normally as a prosecution when the registrant fails to report or submit to induction." Memorandum from the New York City Director of Selective Service to the Selective Service Appeals Board, October 10, 1967 (emphasis in original).[61] Cf. *Mathis* v. *United States,* 391 U.S. 1, 4 (1966) (" . . . tax investigations frequently lead to criminal prosecutions, just as the one here did").

The juxtaposition of limited judicial review with denial of right of counsel at the local board personal appearance has produced agonizing frustration for large numbers of conscientious objector applicants, a frustration which appears to be shared by some federal courts. As the Seventh Circuit stated in *United States* v. *Freeman, supra*:

> "The danger posed by this narrow scope of review is particularly acute when a claim for conscientious objector status is made [citation omitted]. A sincere claimant for conscientious objector status cannot turn to the habeas corpus remedy because his religious belief prevents him from accepting induction under any circumstances. As a result he is limited to seeking review in a criminal trial for refusal to submit. In this criminal proceeding, as in any proceeding reviewing a draft classification, his defense of invalid classification is tested by the 'basis in fact' formula. Under these circumstances conviction is almost inevitable, since the Board's refusal to grant the conscientious objector classification is based on an inference as to

[61] A copy of this unpublished memorandum is in the possession of counsel for the appellee.

> the sincerity of the registrant's belief and there will almost always be something in the record to support an inference of lack of sincerity." 388 F.2d at 248-249.

Accord, United States v. *Wierzchucki,* 248 F. Supp. 788, 789 (W.D. Wisc. 1965) (". . . criminal conviction is virtually inevitable because the die has been cast irrevocably in the administrative proceedings. . . .") That many other federal judges have been troubled by the same "closed circuit" that provoked Judge Doyle's opinion in *Wierzchucki, id.* at 790, is revealed in the cases cited *supra* at pp. 54-55. In effect this "closed circuit" emasculates a federal court in redressing a miscarriage of justice, unless it can find some way of escaping its jurisdictional confinement. We respectfully submit that the result is not only a denial of justice in many cases, but perhaps even more profoundly a denial of the appearance of justice. See Mr. Justice Frankfurter, concurring in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 149, 172 (1951), stressing "the feeling, so important to a popular government, that justice has been done." In a footnote, Mr. Justice Frankfurter quoted with approval the thoughts of others to the same effect:

> "'In a government like ours, entirely popular, care should be taken in every part of the system, not only to do right, but to satisfy the community that right is done.' 5 The Writings and Speeches of Daniel Webster, 163. The same thought is reflected in a recent opinion by the Lord Chief Justice. A witness in a criminal case had been interrogated by the court in the absence of the defendant. Quashing the conviction, Lord Goddard said: 'That is a matter which cannot possibly be justified. . . . Time and again this court has said that justice must not only be done but must manifestly be seen

to be done. . . .' Rex v. Bodmin Justices [1947] KB 321, 325, [1947] 1 All Eng 109." 341 U.S., fn. 19 at 172.

In the face of this human and judicial frustration, a possible exit from the maze is suggested by the trend of this Court's recent decisions on right to counsel under the Sixth Amendment. The right to counsel in a criminal proceeding is, of course, not limited to the trial. See *Coleman* v. *Alabama,* 399 U.S. 1 (1970). This Court held in *United States* v. *Wade,* 388 U.S. 218, 226 (1967):

> ". . . [T]he accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."

The principle of *Powell* v. *Alabama,* 287 U.S. 45 (1932), and its progeny, "requires that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial . . . and to have the effective assistance of counsel at the trial itself." *United States* v. *Wade,* 388 U.S. at 227 (Emphasis added).

This Court has also noted "that certain legal rights may be lost if not exercised" at the critical stage. *Mempa* v. *Rhay,* 389 U.S. 128, 135 (1967). Compare: *United States* v. *Wierzchucki, supra*:

> "When criminal conviction is virtually inevitable because the die has been cast irrevocably in the administrative proceedings . . . the right to counsel in the criminal proceeding may be a hollow thing." 248 F. Supp. at 789.

Thus, the situation in a selective service prosecution is a strikingly accurate illustration of the comment made by this Court in *Escobedo* v. *Illinois*, 378 U.S. 478, 487-488 (1964):

> ". . . [T]he 'right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination.' [Citing Black, J., dissenting in *Groban, supra*] 'One can imagine a cynical prosecutor saying: "Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing counsel can do for them at the trial."' *Ex parte Sullivan*, 107 F. Supp. 514, 517-518 (D. Utah 1952)." [62]

The argument for recognizing a local board personal appearance as a "critical stage" of an ensuing induction refusal prosecution is at least as strong as the argument for recognition of the right to counsel at a police lineup, *United States* v. *Wade, supra,* or at an income tax investigation, *Mathis* v. *United States, supra.* The language of this Court in *Wade* provides an almost perfect description of the status of the frustrated conscientious objector applicant who is denied counsel at his local board personal appearance and who finds himself in a federal court seeking to defend a prosecution for induction refusal on the grounds of the wrongful denial of his conscientious objector classification:

> "The trial which might determine the accused's fate may well not be that in the courtroom but that at the

[62] In *Gonzales* v. *United States*, 348 U.S. 407, 417 (1955), this Court noted that certain procedural rights for conscientious objector claimants must be afforded prior to determination being made by the appeal board, since otherwise it would be "too little and too late."

pretrial confrontation, with the State aligned against the accused, the witness [local board] the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness [local board]. . . ." 388 U.S. at 235-236.

Appellee's counsel recognize that most of the prior discussion of right to counsel at local board personal appearances, or similar hearings in other administrative agencies, has involved Fifth Amendment considerations. We recognize also that for a selective service registrant who is not a conscientious objector applicant, the Sixth Amendment argument may not be as compelling. We respectfully submit, however, that where hopelessly narrow judicial review by criminal prosecution is linked so inextricably and inevitably to a denial of administrative relief at a hearing from which counsel is barred, a Sixth Amendment claim is made which cannot be denied. Accordingly, while we recognize that this Court can rule in appellee's favor on either Fifth Amendment or Sixth Amendment grounds, we urge that the question is of sufficient importance for the Court to rule on both grounds.

4. *Counsel Can Play a Useful and Constructive Role at Local Board Personal Appearances; Removing the Present Prohibition Would Cause No Real Danger of Litigious Interruption.*

The function of counsel at a local board personal appearance would be much the same as that noted by this Court in *Goldberg* v. *Kelly*, 397 U.S. 254, 270-271 (1970): delineating the issues, presenting the facts in an orderly manner, and safeguarding the registrant's interests. That a registrant has a real need for this assistance is conclusively

demonstrated by a review of the multiplicity of factual, legal and discretion-exercising questions on which the local boards must rule. See Section 1, *supra*, pp. 37-41.[63]

Perhaps the most useful role which counsel can play at a local board personal appearance is to safeguard the registrant's interests. Unfortunately, these are interests very much in need of being safeguarded. The registrant needs to be protected against innocent acts or omissions which can harm him, such as ignorance of the regulations or of their interpretation, and consequent violation of them. See *United States* v. *Baker*, 1 S.S.L.R. 3017 (E.D.N.Y. 1968); *United States* v. *Burns*, —— F.2d ——, 3 S.S.L.R. 3191 (10th Cir. 1970); *United States* v. *Harris*, 302 F. Supp. 1194 (D. Ore. 1968); *United States* v. *Harte*, —— F. Supp. ——, 3 S.S.L.R. 3193 (N.D. Ill. 1970). The registrant, likewise, needs protection from unwarranted paternal[illegible]

[63] Footnote 28 of the Government's brief seems to concede the useful role that counsel can play in assisting in the paperwork, but does not appear to answer the obvious question as to why counsel could not be equally or more constructive and helpful if allowed to appear with the registrant at the personal appearance. Suppose a board member does not understand one of the points sought to be made by the registrant in drawing up, with counsel's help, the various "affidavits, written supporting statements and other documentation"? Suppose that a local board member draws from the file some other document which appears to be inconsistent with the claim made in an affidavit or document submitted by the registrant, after being prepared with counsel's assistance? We respectfully submit that the Government's position that counsel may assist except where he is most needed is either cynical, *cf. Escobedo* v. *Illinois*, 378 U.S. at 487-488, or naively ignorant of what actually happens at a local board. On its face, moreover, the proposition is contrary to logic and common sense. "The prohibition of attorneys in hearings doesn't mean a young man doesn't have legal advice. It just means that he may not have it when he needs it most." Testimony of former Attorney-General Clark, in *The Selective Service System: Its Operation, Practices, and Procedures*, Hearing before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 91st Cong., 1st Sess., Nov. 3, 1969, p. 153.

board members; see *Caverly* v. *United States*, 429 F.2d 92, 94 (8th Cir. 1970) (Where the local board had refused I-O classification because, *inter alia*, "immediate induction would solve the registrant's social problems and materially aid his mental maturation process"). But the registrant is most in need of protection against the all-too-frequent non-innocent manifestations of prejudice and hostility. See *Penner* v. *United States*, 399 U.S. 522 (1970), reversing 420 F.2d 344 (10th Cir. 1970), upon confession of error by the Solicitor General;[64] *Capobianco* v. *Laird*, 424 F.2d 1304 (2d Cir. 1970); *United States* v. *Cabbage*, —— F.2d ——, 3 S.S.L.R. 3179 (6th Cir. 1970); *United States* v. *Gustavson*, —— F. Supp. ——, 3 S.S.L.R. 3099 (N.D. Ill. 1969); see also *Dickinson* v. *United States*, 346 U.S. 389 (1953); *Walsh* v. *Local Board No. 10*, 305 F. Supp. 1274, 1279 (S.D.N.Y. 1969).[65]

Nor is there any basis in reality to the Government's cries of alarm (Brief, pp. 43, 45, 47) that removing the prohibition of counsel will cause a paralysis in the Selective Service System. As we have noted previously, counsel's appearance and assistance at Department of Justice hear-

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[64] The Solicitor General confessed error because of a "nagging doubt," see Memorandum for the United States, Oct. Term, 1969, No. 1532, p. 8, that justice had not been done in the case of a third generation Mennonite, second generation conscientious objector, who was denied I-O classification by a local board because of its blanket policy of granting only I-A-O classifications and leaving all questions about I-O classifications to the appeal board; the Presidential Appeal Board removed the I-A-O classification and classified Penner I-A. His conviction and five-year sentence were upheld by the Tenth Circuit; this Court reversed, remanded and directed dismissal of the indictment.

[65] Cf. the amazing statistical revelation by the National Advisory Commission on Selective Service (the Marshall Commission) that 55% of the local board members of one state (unidentified) did not believe that conscientious objectors should be deferred at all. REPORT, p. 29.

ings was recognized for some twenty years.[66] Whatever complaints there were, the slowness of the procedure has never been attributed to the presence of counsel.[67]

This Court has declared that the right of counsel must be recognized at welfare termination hearings, see *Goldberg* v. *Kelly, supra,* discounting the likelihood of litigious interruption. It is doubtful that the number of conscientious objector applicants who will seek to have counsel present at local board personal appearances will exceed the number of welfare recipients who will take advantage of their newly-granted right to counsel.

There is, moreover, a very simple answer to any problem which may arise should it appear that the presence of counsel requires more time of local board members at each personal appearance than otherwise. Under Section 1604.52 a(a) of the regulations, the state director is authorized to establish panels of each local board "in such number as he may determine . . . " and each such panel is vested with all of the jurisdiction possessed by the board. It is well-known that many metropolitan area local boards with large numbers of registrants have made liberal use of this provi-

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[66] The Chief of the Department of Justice conscientious objector program reported in 1958 that some 10,000 hearings had been held since 1948. Smith and Bell, *supra,* at 702. There is no indication, however, of the extent to which registrants took advantage of their right to have counsel at their Justice Department hearings.

[67] The slowness of the old procedure, which led to some adverse congressional comment and the elimination of the Department of Justice role, was principally attributed to the time which it took to complete FBI investigations and to prepare resumés thereof. There is no suggestion anywhere in the House Report recommending elimination of the hearing or in any of the other material which counsel has reviewed that the presence of counsel at the Department of Justice hearings had either a derogatory or a dilatory effect. See H.R. Rep. No. 267, 90th Cong., 1st Sess., pp. 31, 45-46.

sion, allowing for additional board members to handle additional board business.[68]

Rather than an adverse effect, as balefully predicted by the Government, the presence of counsel can well have a constructive and time-saving effect. See *United States* v. *Wade*, 388 U.S. 218, 238 (1967). See also, *Menechino* v. *Oswald*, —— F.2d ——, No. 34665 (2d Cir., August 5, 1970), where the Second Circuit observed that a useful role can be played by an attorney or social worker representative at a parole revocation hearing in obtaining and presenting additional and relevant evidence and helping to "protect against bad decisions or misinformation or lack of adequate information." Slipsheet Opinion, footnote 2, pp. 4088, 4089.[69]

In *United States* v. *Wade*, *supra*, this Court recognized that the presence of an attorney at a critical stage of the pretrial proceeding can play a useful role in monitoring the low-visibility decision-making which occurs at that stage. Such monitoring is equally necessary to expose to view the otherwise hidden levels of administrative adjudication. See Handler, *Controlling Official Behavior in Welfare Administration*, 54 CAL. L. REV. 479 (1966); DAVIS AND DOLBEARE, LITTLE GROUPS OF NEIGHBORS: THE SELECTIVE SERVICE SYSTEM (1968). The enormous powers over personal and property rights vested in the local boards, see Section 1,

[68] Two of the largest local boards in the Greater New York area, Mount Vernon Local Board No. 10 and Great Neck Local Board No. 3, have respectively 3 and 5 panels of five members each.

[69] The Second Circuit mentioned another reason why counsel can be useful which is equally applicable to an appearance before a local board: "Furthermore, he [the applicant] is unlikely because of nervous tension to be able to express himself as logically to the Board as he might in a different setting." *Menechino* v. *Oswald*, *supra*.

supra, pp. 37-41, and the unhappy record of the virtually unchecked and unreviewable exercise of these powers, see Section 3, *supra,* and cases cited, pp. 81-83, demonstrate how far removed the situation is from the proper conditions for informal administrative procedures:

> "The extension of unconventional processes presupposes a subordinate personnel equipped to use them fairly and an administrative hierarchy fired with a sense of responsibility for scrupulously just results." GELLHORN AND BYSE, ADMINISTRATIVE LAW, 664-665 (1954 ed.).

5. The Registrant's Constitutional Right to Counsel Is Not Satisfied by the Government Appeal Agents or the Optional Provision of Advisors to Registrants.

Since the Government does not propose that either the Government Appeal Agent or the "advisor to registrants" be permitted to appear at the local board personal appearance whenever the registrant wishes to have counsel with him, it is hardly necessary to refute the contentions made concerning the functioning of these persons. Moreover, if the selective service regulations were to be amended so as to provide that the prohibition of counsel would be inapplicable to officially-appointed Government Appeal Agents and advisors, and to provide further that such persons and such persons only could represent registrants at personal appearances, this would raise other constitutional questions about the right to privately retained counsel of one's own choice rather than the compulsion to accept the Government-designated lawyer. It is clear that where the right to counsel exists, one may not be forced into accepting state-appointed counsel when he has retained counsel of his own. *Gomez* v. *Heard,* 218 F. Supp. 228 (S.D. Texas

1962), *aff'd* 321 F.2d 88 (5th Cir. 1963). See also, *Powell* v. *Alabama,* 287 U.S. 45, 53 (1932) (the right of an accused to counsel includes "a fair opportunity to secure counsel of his own choice"); *Chandler* v. *Fretag,* 348 U.S. 3 (1954); *Crooker* v. *California,* 357 U.S. 433 (1958).[70]

It is the Government's position that (a) there is no constitutional impediment to prohibiting counsel at local board personal appearances, and (b) such legal needs as registrants have are amply satisfied by the provisions of Government Appeal Agents and advisors to registrants. Brief, p. 41, footnote 28. Somewhat inconsistently, the Government argues that private counsel can perform the same services as Government Appeal Agents and advisors to registrants. *Id.* Thus, the Government does not really meet the constitutional due process question of whether the right to counsel means the right to effective counsel, appearing in person with the client before the decision makers.

Nevertheless, it may be useful to set out the total inadequacy of Government Appeal Agents and advisors to registrants. First, insofar as concerns advisors to registrants, see 32 C.F.R. §1604.41, these functionaries if they ever existed, are optional and have been optional since 1955, as the Government concedes. Brief, p. 32, footnote 22. The utter failure of the system to provide advisors to registrants was scornfully noted by the Marshall Commission, see Report, pp. 28, 29, and also by courts, both when the requirement was mandatory, *Steele* v. *United States,* 240

[70] The Uniform Code of Military Justice, 10 U.S.C.A. §838b, provides, in part: "The accused has the right to be represented in his defense before a general or special court-martial by civilian counsel if provided by him, or by military counsel of his own selection if reasonably available, or by the defense counsel detailed under Section 827 of this title (article 27) • • • ."

F.2d 142 (1st Cir. 1956), and after the requirement became optional. See *United States* v. *Spiro*, 384 F.2d 159 (3rd Cir. 1967); *United States* v. *Heljenek*, 275 F. Supp. 579, 589 (E.D. Pa. 1967); see also, *United States* v. *Harris*, 302 F. Supp. 1194, 1196 (D. Ore. 1968).

Insofar as concerns Government Appeal Agents, a number of obvious deficiencies and inadequacies were noted by the court below. A. 40-41.[71] The main problem with the Government Appeal Agents, however, is not the inadequacy

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[71] Under 32 C.F.R. §1604.71, Appeal Agents need not be lawyers and cannot appear before the board except when requested by the board. Moreover, Section 1604.71(d)(5) "injects such a conflict of interest into any representation the appeal agent may provide that it is doubtful that he could act for the registrant in the role of an attorney." A. 41. Further, with respect to the appeal agent's conflict of interest, seee Layton, *Lawyers Cannot Be Informants*, 54 ABAJ 153, 154 (1968); ABA Informal Opinion No. 1026; ABA Informal Opinion No. 287. This court has clearly instructed bench and bar against allowing the representation of conflicting interests. See, e.g., *Glasser* v. *United States*, 315 U.S. 60, 68-72 (1942). See also the following pertinent provisions from the ABA Code of Professional Responsibility:

> "EC4-1 Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client * * *."
>
> "EC4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes * * *"
>
> "EC5-1 The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client."
>
> "EC5-14 Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his

of representation arising from a possible conflict of interest, see *United States* v. *Williams,* 420 F.2d 288 (10th Cir. 1970) (Appeal Agent employed by registrant's wife in contested divorce action); or the inadequacy of representation because of identification with the board and a paternalistic attitude to the registrant, see *United States* v. *DeLime,* 223 F.2d 96 (3rd Cir. 1955) (Government Appeal Agent indistinguishable from board members in unfriendly examination of registrant). The main problem over the years has been the simple invisibility and unavailability of the Government Appeal Agents, even to perform such services for the registrant as the regulations allow. The Marshall Commission's acerbic observation is most appropriate:

> "The Selective Service System contains more than 8,000 advisers, whose task is to assist men at the time of their registration (by providing information, answering questions, and so forth), and some 4,000 appeal agents to aid registrants who wish to appeal. These men, like the board members themselves, are not compensated. They are also the most elusive components of the entire System. The research team which reported the results of its intensive one-state study told the Commission: 'The clear fact is . . . that appeal agents are almost totally inactive. Most board members barely know who their appeal agent is and cannot recall when he was last in the office. Clerks freely admit that their appeal agents have checked no files, seen no registrants, made no appeals in years. What advising

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judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse or otherwise discordant."

(Adopted by ABA House of Delegates, Aug. 12, 1969, effective Jan. 1, 1970.)

of registrants there is, must be done by clerks or by an occasional private attorney. Most registrants are probably quite unaware that there are appeal agents in the System.' The team concludes: 'We doubt that this is peculair [*sic*] to our State.' The Commission, on the evidence presented to it, shares that doubt. The condition appears to be uniform throughout the System—indeed, perhaps, it is its most uniform characteristic." REPORT, pp. 28-29.

6. *There Is a Corps of Private Counsel Competent in Selective Service Matters and Available to Perform These Necessary Functions.*

The Government suggests that there might be some unfairness in a system where registrants who could afford private counsel would be represented while indigent registrants would not. Brief, pp. 27, 30, 40, n. 28. It is a curious logic which worries about the availability of counsel to indigent registrants and argues that, therefore, counsel should be available to none.

If the Government is truly concerned about meeting such disparity as exists, the problem can be easily resolved by an amendment to the regulations which would authorize the Government Appeal Agents—and advisors to registrants—to appear before local boards representing registrants at the registrants' request.[72]

But the Government's commendable concern for the welfare of registrants unable to afford private counsel need trouble it no longer. There is in existence a selective service

[72] Indeed, the Government seems to recognize this natural sharing of responsibility—in terms of legal services to registrants other than local board appearances—by the retained counsel for those who can afford it and by the Government Appeal Agent and the advisor to registrants for those unable to afford counsel. Brief, p. 40, n. 28.

bar which fully recognizes its responsibility to provide free professional services to those who cannot afford privately retained attorneys.

In addition to the already existing structure of legal aid and public defender services available throughout the country, there is also a vast superstructure of selective service legal counseling which far exceeds the free legal services available in other areas of the law where this Court has held that persons are entitled to be represented by counsel.

The Office of Economic Opportunity lists 283 legal services projects which it funds (OEO Pamphlet 6140-2). One such project is Community Action for Legal Services, Inc. (CALS) in New York, which has 26 offices throughout New York City, and employs 150 attorneys full time. CALS, in its brochure "WE CAN HELP," states that it provides "counseling and representation before draft boards" for indigent draft registrants.[73]

New York City also has a panel of approximately 125 lawyers affiliated with the New York Civil Liberties Union who provide free counseling and representation for draft registrants. There are similar panels of selective service law-

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[73] See the statement of Donald M. Stocks, Deputy Director of the Legal Service Program, in *Right of Counsel in the Selective Service System*, Hearing before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 90th Cong., 2d Sess., May 16, 1968, at p. 94:

> Mr. Stocks: We provide legal services to persons who are unable to afford other counsel. The attorneys would be available to provide legal counsel to any person appearing before the draft board who reaches the eligibility standards.
>
> That is, basically, those persons who are unable to pay for private legal counsel.
>
> * * * * *
>
> Senator Long: In other words, you think your organization will be in a position to furnish counsel to registrants who were not able to employ them?
>
> Mr. Stocks: Yes; we do.

yers providing free services in every major city in the United States. These panels include over 100 lawyers each in the cities of Chicago, Los Angeles and San Francisco. There are also panels in operation in Boston, Philadelphia, Washington, Detroit, Denver and Seattle.[74] The Selective Service Law Reporter, published by the Public Law Education Institute, has 1200 "special subscribers" (i.e. subscribers who pay a special rate because they provide free counseling services). TATUM AND TUCHINSKY, GUIDE TO THE DRAFT (1969), on pages 272-281, lists 123 organizations providing free draft counseling and representation throughout the country. See also RIVKIN, GI RIGHTS AND ARMY JUSTICE: THE DRAFTEE'S GUIDE TO MILITARY LIFE AND LAW, 360-370 (1970).

In addition to services by practicing lawyers, there is also the possibility of representation by many thousands of expertly trained laymen who now provide selective service counseling. See dissenting opinion of Justice Douglas in *Hackin* v. *Arizona,* 389 U.S. 143 (1967); cf. S.S.L.R. ¶1005.

7. *Conclusion of Point III.*

We respectfully submit that the foregoing discussion ineluctably leads to the conclusion that

> ". . . without the right at least to counsel, the classification proceeding today, under present circumstances, is a snare and a delusion, a farce committed upon an unsuspecting public, and a violation of one's most important of constitutional rights. . . ."

Forkosch, *supra,* 22 So. CAR. L. REV. at 343.

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[74] Appellee's counsel are personally familiar with the existence and operation of many of these panels.

CONCLUSION

For the reasons stated, the judgment of the district court should be affirmed.

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